Q. Actually the sport shirt business developed during the war or subsequent thereto, didn't it? A. Well there were a good many short-sleeved goods that were classified as sports shirts, sport shirt fabrics, but generally speaking the percentage possibly wasn't as great then as it is today, but there was sport shirts business.

Q. But actually the sport shirt business in the gabardine and the wool shirt with the long sleeves, buttons down the front, zippers on it someway or other, that business received its big impetus during the war didn't it? A. It increased.

Q. Well it increased to where—— A. Well to my way of thinking it could have increased because everybody was fighting for production and everybody wasn't equipped to make dress shirts, where a good many needle operators could go into the sport shirt field.

Q. And it was very difficult to obtain a dress shirt during the war was it not? Certain phases of it? A. Certain phases of it.

Q. Well there actually were shortages in dress shirts, such that you couldn't fill the demand, isn't that true? A. At certain times.

Q. Well during the war? A. That's right.

Q. Now it was also a fact was it not that during the war it was very difficult to get dress shirts laundered? A. Well that I didn't experience because my wife does my dress shirt laundering.

Q. And you didn't use a laundry in Chicago during the war? A. No.

Q. You don't know about that? A. No I don't.

Q. Isn't it a fact that at the present time sport shirts are still a very large percentage of the shirt business? A. No I wouldn't say, what do you mean by very large, you mean by predominating percentage?

Q. Oh not more than 50 per cent but up to—— A. 10 per cent, it's a——

Q. It's a substantial proportion? A. Yes today I would say it has improved.

Q. A much greater percentage of the shirt business than it was before the war isn't it? A. Well I wouldn't have access to those figures.

Judge Druffel: State what you know about it from your experience. They're selling a greater number of sports shirts today than they did prior to the war?

The Witness: Yes that's true.

By Mr. Horton:

Q. And that includes sports shirts of a good many types and styles does it not? A. Not a good many, some sports shirts sell and sell freely, but not all cloths, not all construction is sold freely, and I don't sell them freely.

Q. Before the war did you sell other products than shirts that were sold in men's stores? Other products? A. Yes sir I did.

Q. You sold the general line of Reliance, did you? A. That's right.

Q. As a matter of fact Reliance was mainly work shirt manufacturer was it not before the war? A. No they had different divisions, they had a dress shirt division, ladies' dress division, boys' dress shirt division, pajama division, work clothing division; they had five or six different divisions in their manufacturing set up.

Q. Did they manufacture sports shirts of these heavy fabric types before the war? A. What do you mean by heavy fabric?

Q. Well, there is one type of sport shirt which I knew when I was a boy, it had short sleeves and an open neck, was made of cambric or cotton. We called that a sport shirt. A. That type is still manufactured, I mean——

Q. Now the other type of sport shirt that we're talking about in this case is one that's made out of rayon, I suppose, or flannel, wool, gabardine, corduroy. I call that a heavy fabric, do you agree with that? A. No I don't agree with that.

Q. Well drawing that distinction between them, are the sports shirts of the type of those fabrics, other than the cambric? Short-sleeved cambric, were they made by Reliance before the war? A. Yes they were.

Q. Do you know what they were called? A. Ensenada.

Q. The Ensenada shirt was made when, starting just before the war, was it not? A. Oh no, I think it goes back prior, a good deal prior to that. I would say in '36, '35, '36 or '37, '36 I think would hit it.

Q. Did the Mack Shirt Company make what I call the heavy fabric type of shirts? Sport shirts before the war? A. That I can't answer, I wasn't too familiar with their product at that particular time.

Q. Did you know what the Mack Shirt's products were before you were employed by that company in 1944? A. I knew they were dress shirt manufacturers, and boys' shirt manufacturers, but I mean I didn't have the comprehensive knowledge of what they made and the type of fabrics that they went into and the various places they went into, I knew who they were, I knew they were shirt manufacturers.

Q. Now since you've been employed by Mack Shirt Corporation, you are familiar with their operations in connection with this zipper shirt aren't you? A. Yes sir.

Q. And isn't it a fact that——

Judge Druffel: You mean by this zippered shirt the patented shirt?

Mr. Horton: Well this shirt that we are referring to is the Flightmaster.

By Mr. Horton:

Q. Is the Flightmaster the shirt that is made by Mack? A. The Flightmaster is made by Mack and it is a patented zipper shirt.

Q. Don't you know it to be a fact that the Mack Shirt Corporation has represented to the public that it is the sole and exclusive licensee for the manufacture of that shirt?

Judge Marx: You mean in writing, if Your Honor please, if he is then the writing is the best evidence.

Judge Druffel: Well there's a question now about just what is meant by the writing.

Judge Marx: Well we published advertisements which we'll have here and produce in evidence.

Judge Druffel: Well doesn't the witness know about those advertisements, couldn't he answer to the advertisements, couldn't he answer the question and bring those in?

Judge Marx: Well I didn't object to that, if he wants, that's what I said, if it's a written representation that he is talking about then the writing is the best evidence.

Mr. Horton: Well I asked him what his knowledge of it was.

The Witness: Well I have seen ads with advertisements to the effect that——

Judge Marx: Well I object to his stating the effect, but the advertisement is the best evidence, that's my point.

By Mr. Horton:

Q. Do you have one of those advertisements?

Judge Marx: Yes, we have them here.

Mr. Horton: I'm asking the witness.

The Witness: I don't have one on my person, no.

By Mr. Horton:

Q. You were asked questions about advertisements of the Mack Shirt Corporation were you not? A. What do you mean I was——

Q. Didn't you identify some ads? A. No.

Judge Marx: No, not this witness.

Judge Druffel: Well do you have a copy of it, could you show the witness?

Mr. Horton: I don't have a copy of it, Your Honor, I saw it.

Judge Marx: We have it here if Your Honor please. It's a lot of material, here we are now.

By Horton:

Q. Will you look at this ad appearing on page 38 of this book and state whether or not that, that you saw that ad and are familiar with it. A. I saw that ad.

Q. And was that published by the Mack Shirt Corporation? A. Well that I don't know who it was published by.

Q. Oh, then you don't know about these ads put out by, or carrying the name of the Mack Shirt Corporation? A. Yes, very definitely.

Q. Well do you know whether that one was? On page 38. A. I've seen the ad and I am familiar with it, and I've had the ad in my possession, but actually who published the ad I don't know.

Judge Druffel: Well doesn't this speak for itself?

Mr. Horton: Yes, your Honor it does.

I assume that the other side doesn't deny the authenticity of it?

Judge Marx: No, certainly not.

By Mr. Horton:

Q. Now both of these ads I have shown you here——

Judge Marx: The fact is we offered them in connection with the book this morning.

By Mr. Horton:

Q. In the one ad on page 38, the Mack Shirt Company says that it is the original and sole licensee, does it not? A. That's right.

Q. And in the ad on page 39, 37 it says the Mack Shirt Company is the sole and exclusive licensee, does it not? A. Yes sir.

Q. Is the answer yes? A. Yes.

Judge Marx: Well if Your Honor please it does say what counsel read, but it is the danger that I foresaw and therefore I object to his stating that that's what's contained in the ad. The, because when you take the written evidence it says, it is very short and I'll read it to you Your Honor so Your Honor will see the difference between what he asked him and what it actually said: "Announcement—As the original and sole licensee of Cavu's Patent No. D-146895, we now extend this license privilege to Marlboro Shirt Company, Inc., of Baltimore Maryland, which also will distribute it, the patented shirt, with diagonal zipper under their Spitfire label." The Mack Shirt Corporation, Cincinnati, Richard J. Mack, President. Then it's got "To whom it may concern, use and sale of infringing products will be prosecuted to the full extent of the patent laws."

Mr. Horton: I don't see how that's any different from what I said it was.

Judge Marx: It's extending the license to the Marlboro Shirt Company.

By Mr. Horton:

Q. What is it that you say is the new and novel feature of the Brohard shirt? A. Well——

Judge Marx: We object to that, just a minute.

Mr. Horton: He already—he talked about it.

Judge Marx: My colleague reminds me that we did not ask the witness what the utility features of the patent were, or its mechanical features were, we asked him on questions of appearance. He described that he had not seen anything like it before.

Mr. Horton: He said it was new and novel and distinctly unique in appearance.

Judge Marx: Yes.

Judge Druffel: Well he went a little bit overboard, he——

Judge Marx: Didn't describe it at all. He described the appearance of it when it was laid on the bed in front of him.

Judge Druffel: That's what I objected to that he took in so much territory, now this is cross examination, and he did, he said the shirt was tossed on the board and he was so struck with it and from there on——

Mr. Horton: Particularly unique and novel and——

Judge Marx: In appearance.

Judge Druffel: Well he can ask him what there was to it, go ahead.

Judge Marx: Our objection is that he goes beyond the direct examination of this witness.

Judge Druffel: Well it's easier for cross examination, and there will be practically no limit to the cross examination, so you may proceed.

By Mr. Horton:

Q. Well very briefly, what were the points of uniqueness and novelty about this shirt, you had in mind when you used that language? A. Well number one, the important item in the shirt, was the way it was joined at the collar, and in addition wherein the zipper was eliminated at the waist line to give the man that wanted to wear it in his trousers a neat comfortable fit without a bulging of the zipper, but primarily, I would say the way the zipper was joined at the neckline and what was offered in the way of windproofing or whatever it is.

Q. Well we were talking about appearance, I thought. A. Well you were asking me what I thought were the aspects of the garment.

Q. I was asking you what you meant when you used the word novel and unique. A. Well you didn't ask me that, though, you asked me what I thought——

Judge Druffel: Well he's asking you now, let's quit fencing and get down to——

The Witness: What is it you want me to——

Mr. Horton: Well what do you, go ahead——

A. (continuing) the collar, the way the zipper is joined at the collar, the uniqueness in which the zipper is put in so that it gives a plain front and also has an individuality in the garment with the zipper being on a diagonal or on a bias; but primarily to me what makes the whole thing is the way the garment upfitted around the collar and the way it works in the man's trousers. The comfort that he has there over a conventional front zipper that would buckle.

Q. What is your present position with the Mack Company? A. I am a salesman.

Q. Are you an officer of that company? A. No sir.

Q. Do you have an exclusive territory? A. I hope so.

Q. I mean that, are you the head salesman for your territory? A. Yes sir.

Q. What is that territory? A. Chicago and Wisconsin.

Q. Does that include southern Illinois, too? A. No sir.

Q. Just the Chicago area? A. Just Chicago area proper and Wisconsin.

Mr. Horton: That's all.

Judge Druffel: Suppose we take just a brief recess at this time.

(Short recess.)

Judge Marx: Next witness, Carl Forney.
Whereupon,

Carl A. Forney

was called as a witness, and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Tjoflat:

Q. Will you state your name and age, please? A. Carl A. Forney.

Q. And your age? A. 50.

Q. And where do you live? A. 2021 Burnet Avenue.

Q. Cincinnati? A. That's right.

Q. And what's your business, Mr. Forney? A. Clothing manufacturer.

Q. How long have you been in the clothing manufacturing? A. 27 years.

Q. What kind of clothing do you manufacture? A. Men's handmade.

Q. Do you design clothes? A. That's right.

Q. In your business you design and cut and sew the clothes together? A. That's right.

Q. How long have you had experience in designing men's clothes? A. Oh, approximately 30 years.

Q. And how long have you had experience in designing women's clothes? A. About 20 years.

Q. I would like to show you a copy of Design patent No. 146895, that's exhibit, Plaintiff's exhibit, three, have you examined that patent? A. No, I haven't.

Q. Will you look at it please, I'd like you to address your attention to the drawing on that. Now I hand you Plaintiff's exhibit 1, and ask you to examine that, from the standpoint of its appearance. In what way does that Ex-

hibit 1, the shirt, compare with the figure one in this patent? A. It's the same thing.

Q. Now how is that shirt, Plaintiff's Exhibit 1, constructed in the front? A. Well it has a diagonal zipper started from underneath the collar and runs down about nineteen or twenty inches in length to about approximately below the waist line and then it zips open with the slider down so that you can get into, flap it open to your trousers.

Q. Now I'd like you to examine this garment a little longer as I'll ask you some questions about it. Does that shirt have a front and a back? A. Yes.

Q. Does the front and back terminate in an upper neckline? A. It has a separate collar, it has a neckline.

Q. Does it have a fold-over collar attached at the neckline?

Mr. Horton: Your Honor I object to this kind of examination, Your Honor in using the language of the claim, I believe, the patent, that it is improper to examine this witness on that.

Judge Druffel: He said he was unfamiliar with the patent to start with, didn't you?

The Witness: That's right.

Judge Druffel: Well of course your questions here are objectionable in that they suggest the answer.

Mr. Horton: I think if you are going to ask him to describe the shirt I think you'd better ask him——

Judge Druffel: Are you trying to get from this witness that the exhibit he has reads within the limits of this patent?

Mr. Tjoflat: Yes sir.

Judge Druffel: Well I know but you see the questions here you know suggest the answers, that's objectionable, that's the—Are you familiar with the patent?

The Witness: I am not familiar with the patent. I've heard of it but I've never examined the shirts heretofore.

Judge Druffel: Well I question in view of that, you see the—the competency of this witness to describe this as reading on the patent.

By Mr. Tjoflat:

Q. Will you explain where the zipper starts on this shirt? A. Well that starts, that's about an inch towards the inside of the collar, on the right hand side.

Q. How's that? A. That's the inside of the collar, and then from that point on.

Q. Then where does it run? A. It starts an inch, approximately an inch from underneath the right side of the collar and runs diagonal to about about nineteen, approximately nineteen inches down. Now it has a long pointed collar.

Q. What else can you say about the front of that garment? A. It has those patched pockets on it, pointed flaps.

Q. But in other respects what can you say about the front of the garment? A. Other than that, the description that I've seen there——

Judge Marx: By description you've seen there means what?

The Witness: The figure 1.

Judge Marx: On the design patent?

The Witness: On the design patent, that's right, it's identical.

Mr. Tjoflat: All right, you may cross examine.

CROSS EXAMINATION

By Mr. Horton:

Q. Mr. Forney, by whom are you employed? A. By myself.

Q. And what is the name of that company? A. Forney Tailors, Inc.

Q. Do you manufacture and sell your own line of goods? A. That's right, through the storekeepers, retailers.

Q. Do you manufacture goods for other manufacturers? A. No sir.

Q. Do you make shirts for Cavu Company? A. No sir.

Q. Have you ever made them? A. No sir, we're not in the shirt business.

Q. Have you ever made shirts at all? A. Never.

Q. Well what kind of clothing is it that you manufacture? A. Men's.

Q. Suits? A. Suits.

Q. Overcoats? A. Overcoats, topcoats, uniforms.

Q. By uniforms what do you mean, military uniforms? A. Military uniforms, that's right.

Q. You were looking at Figure 1 of the design patent in suit and I think you said that this shirt, Exhibit 1, well the shirt's exhibit 1 and you were looking at the design patent? You said it was identical where actually that pocket is entirely different than the pocket shown in Picture 1 of the design, isn't it? A. That's true, but when you look at a shirt, or, you look at any article from the style standpoint, don't you?

Q. Well I'll ask the questions. The cuffs on the shirt are entirely different than the cuffs shown on Figure 1 of the design patent, aren't they? A. Yes, those are different sir.

Q. And the fact that it has a pointed collar, many shirts have pointed collars, don't they? A. Mostly.

Q. It's quite common in sport shirts to have long pointed collars, isn't it? A. That's true.

Q. Now, all shirts have fronts and backs too, don't they? A. That's right.

Q. They all have sleeves? A. Right.

Q. Now when you say that that's identical with figure 1, and I'm referring to this shirt Exhibit 1, you have reference to the zipper, isn't that true? A. The zipper line and the effect of the shirt, collar pulled down.

Q. The fact that the zipper goes up under the collar? A. Up underneath the collar, that's right.

Q. You know as a clothing manufacturer that it's old to have zippers running up underneath the collar isn't it? A. It's old but that's the first time I've ever seen it run in that direction. Having that diagonal and starting at that point.

Q. But the habit of running underneath the collar is old isn't it? A. Well I have never seen it before.

Q. Have you studied the shirt and jacket art before testifying here? A. I haven't paid much attention to it, though as I said this is something new and different.

Mr. Horton: That's all.

Judge Druffel: All right, next witness.

Judge Marx: We will go on with Mr. Brohard.

Whereupon,

Montie M. Brohard, Jr.,

was recalled as a witness, and having been previously duly sworn was examined and testified further as follows:

FURTHER DIRECT EXAMINATION

By Judge Marx:

Q. While we go ahead with some of the questions relating to the acceptance of the shirt, I would like to ask Mrs. Brohard, if you will step up here just a minute please.

I think you testified this morning that the shirt is equally adaptable for the woman, can you point out wherein that shirt as modeled by, this is your wife, isn't it? A. Right.

Mr. Horton: I make the same objection, Your Honor, that the defendant in this case is not charged with infringement by the sale of these women's garments.

Judge Druffel: Well this may go to the question of the utility of this garment.

Judge Marx: That's right, your Honor, utility and novelty also.

By Judge Marx:

Q. Will you stand up there and point out wherein this is adaptable for women's wear as well as men's wear? A. This shirt is equally adaptable to women's wear as well as men's wear, because of the ease of access into the garment. Women are subject to the same problem of propwash and winds as men at an airport. Women have the same desire for a flowing, smooth front on their shirt design as men when they wear jackets with their shirt, and women are equally if not more so interested in unusual styling than men. This shirt has been used for ski wear for the same reason that it was originally designed for air wear, in that there is quite a breeze created when people are on skis, they get, achieve quite a speed and therefore it protects the throat and chest on women the same as it does on men.

Judge Druffel: Well that's about the story.

The Witness: Well I think it does.

By Judge Marx:

Q. Well I was going to ask, well that's all right then, did your wife also model the garment in some of the photographs shown in the book? A. I don't recall, I think she may have, no she didn't.

Q. Trying to identify the ladies who did, that's all. A. They are Conover models in the book.

Q. Well now, what did you experience as to the acceptance, how did you introduce this invention of yours to the

public and what did you experience as to the acceptance of it by the public? A. I introduced this shirt early in 1944, and the response by the buyers of the country was completely spontaneous.

Mr. Horton: I object to those conclusions, sir.

By Judge Marx:

Q. What did the buyers do, is the question? A. The buyers bought, that's the answer to the question, and I think that deserves the description of spontaneous.

Judge Druffel: No now, let's not, we're at odds here now you see the——

Q. Well to what extent, as far as your capacity to produce was concerned did the buyers purchase the shirt? A. We received far more orders than our small equipment permitted us to produce them.

Q. In what markets did you introduce the shirt and state how you introduced it. A. My original introduction was at the Park Central Hotel in New York City, where my original intentions were to show it to just the New York Stores, to whom we had sold Army Officers shirts, but the buying offices in New York who had constituents all over the United States began wiring and calling their constituents, and I began to receive wires and phone calls to be sure to hold my display open until the buyers from these out of town stores could get in. To make a story short, I sold stores, that is buyers representing stores, all over the United States.

Judge Druffel: Were you the manufacturer with yourself and your own company, was that before Mack, you contracted with Mack?

The Witness: That's right.

By Judge Marx:

Q. Well just give the Judge at this point the history of how it was first manufactured, and where, and then what

you did from then on in reference to the licensing. A. It was first manufactured by the Brohard Rainer Shirt Manufacturing Corporation, for me,——

Q. Did you have an interest in that company? A. Yes I held about 25 per cent of the common stock of the Brohard Rainer Shirt Corporation. Then as the demand for the shirt began to grow, I left the Brohard Rainer Shirt Corporation and began my own small business, still contracting with the Brohard Rainer Shirt Corporation to make the shirts for me on a contract basis.

Q. Now you say you formed your own small company, what was that company? A. That company was a partnership in which my brother and I were partners, at the beginning.

Q. Go ahead. A. A little bit later on we incorporated the partnership still having shirts contracted for us by the Brohard Rainer Shirt Corporation, and it was right around this time that we began having such a demand for the shirts that we couldn't fulfill all the orders and it was just about this time coincidentally that the Mack Shirt Corporation approached me for a license to make the shirt.

Q. What was the name of the corporation that you spoke of as succeeding, or you say you incorporated the partnership, what was it. A. The name of the partnership was Cavu Clothes, and when we incorporated it we merely added Inc., to the term Cavu Clothes. Making it Cavu Clothes, Inc.

Q. What does Cavu stand for? A. Cavu stands for "Ceiling and Visibility Unlimited."

Q. Which is an airplane term? A. Cavu is an airplane term, it's the alliteration of the call letters that the tower gives out to a pilot when he asks for weather information and in reply to which the tower wants to tell him that the

sky and visibility is unlimited, the ceiling of the sky is unlimited. And rather than saying C.A.V.U. they have fallen into the word Cavu.

Q. Go ahead now, with your chronological description of the license. A. Realizing that we couldn't take care of the demand for all of the shirts that could be sold, we more or less welcomed the entrance of the Mack Shirt Corporation into our distributional program, because the manufacturer of their type, we realized wanted to keep the thing on the same kind of level that we did.

Mr. Horton: I move to strike that what Mack's Shirt Company's ideas were about their business. I think this witness ought to stick to facts rather than——

By Judge Marx:

Q. Just state, did you grant a limited license to the Mack Shirt Company? A. Yes we did grant a limited license to the Mack Shirt Corporation.

Q. Now, with reference to the United States Navy Flight Corps., will you tell us what occurred with reference to that branch of the United States Service and the shirt patented by you. A. About the time that our original promotion was started with Bonwit Teller in New York, a, one of the ladies from the Navy Personnel Group and the Hospital Group happened to be in New York at a time coincidental with their trying to reach a decision as to what new garment their Flying Navy Nurses should wear, and the first approach was through the store of Bonwit Teller.

Mr. Horton: Now just a minute, is this something that you know about? Do you know that they were then considering——

The Witness: Yes.

Mr. Horton: Taking up the uniform? Who, is that something that somebody told you?

The Witness: I attended a meeting in Washington, D. C., and that's how I know this.

Mr. Horton: You attended a meeting before this lady was present in New York?

The Witness: No, afterwards.

Mr. Horton: I don't like to be objecting all the time to his testimony—but he seems to characterize things so much.

Judge Druffel: Well this goes to the acceptance of the design, I guess.

Judge Marx: Yes.

Judge Druffel: All right, you may answer.

The Witness: I stopped at the, at the place where they were having their meeting and trying to decide upon a style for the new Flying Navy Nurses. The Flying Navy Nurses apparently was a new organization, within the Navy, and they were having, I was told that they were having the most difficulty with high throat and chest ailments, and that after examining several garments they selected this garment because of the protection that it afforded the Navy Nurses when they were on duty carrying wounded men, when frequently they would open their conventional shirt and exposing their chests when they were perspiring frequently resulted in colds and throat and chest infections.

The shirt was not officially adopted at that time but later on the Navy Bureau of Research wrote to us and applied for a royalty free license to make, to use the shirt as the official flight uniform of the Flying Navy Nurses.

By Judge Marx:

Q. Did you grant that license? A. We did.

Mr. Horton: Now just a minute, when did you grant that license. It was after this suit was filed, wasn't it?

The Witness: I don't remember the date.

Judge Marx: Well now I really believe, I haven't objected to these interruptions, but I think it would be con-

ducive to dispatch in the progress of the trial if counsel reserved his cross examination until the proper time.

Mr. Horton: Well I object to getting into things that are outside the issue of this case.

Judge Marx: It wasn't an objection, it was a question to the witness.

Mr. Horton: And I think that I do have a right, when I know that they come into something that is beyond the scope of the suit.

Judge Druffel: Well I think that a royalty free license was granted and beyond the fact that they adopted it to show acceptance I think you are limited.

By Judge Marx:

Q. Now, what by the way was the name, the Trade Name under which Cavu Clothes, Cavu, Inc., sold your patented shirts? To men, for men? A. Tailspin is the trade style, but we sell diagonal zippered shirts.

Q. And what was the trade name under which it was sold to women? A. Tailspin De-icer. Do you want me to make a comment here?

Q. Yes. A. All of our garments are named after aeronautic maneuvers and aircraft terminology. De-icer is the equipment which throws off the ice on an airplane when it collects ice in flight.

Q. And what was the name under which the Mack Shirt Company marketed your patented shirt? A. Flightmaster.

Q. And what was the name under which Marlboro subsequently marketed your patented shirts? A. Spitfire.

Q. I'll show you on page 22 of this booklet which has heretofore been identified, with the number 5, an advertisement which appeared, an advertisement at the top of the page. I ask you where that appeared? A. This?

Q. Yes, colored advertisement.

Mr. Horton: Now, Your Honor, we're getting back to that same thing, it's something that was put out by some third parties, and I object to the question——

Judge Marx: That's the reason, if it was put out by him, it would be subject to different rules, it might be a self-serving declaration, if he said that my invention is novel and so forth, he said that to the Patent Office but this is, shows the state of mind of the public, because I expect his answer to show that he didn't cause this to appear and this appeared in the recognized periodical of the, as far as he knows from the free volition of the proprietors.

Mr. Horton: Well there again it doesn't show the state of mind because we don't know what that person had in mind that wrote this, unless he's here for cross examination it's improper.

Judge Marx: It shows the public acceptance, it shows public recognition and it reflects as the Court said on novelty.

Judge Druffel: It may show public recognition, or it may show the recognition by the editor of that magazine, that's what it shows doesn't it. Let's go into that then, its——

By Judge Marx:

Q. Now what do you know about this article at the top of page 22, headed Charm? And the insert pages in it? A. All I know is that it appeared in there, in Charm without my knowledge, and as a matter of fact someone else told me it was in there.

Q. Did you see it in there—and did you see this article in this magazine? A. Yes, I bought three copies of the magazine and cut this copy out for my scrap book.

Q. And what is the magazine? A. Charm magazine.

Q. Does that have a national circulation? A. I think it does, I'm sure it does.

Q. And does the picture shown here, show a picture of the Flight, Navy Nurse Corps Flight, summerwork uniform as far as your patented shirt is concerned?

Mr. Horton: May I, this is getting into a phase that I think is highly objectionable.

Judge Druffel: Well I said that the, since there is no royalty at issue here that the limit of the testimony should be if it was actually done that the Navy adopted it.

Judge Marx: Yes, but now it is merely identifying what they did adopt, by a photographic or graphic representation.

Judge Druffel: Well for that purpose it will be accepted.

The Witness: They did adopt this uniform.

Judge Marx: I'd like Your Honor to look——

Judge Druffel: I saw it before, that's okay.

By Judge Marx:

Q. Now referring to page 5, Plaintiff's Exhibit 5, for identification, are there pictures or advertisements, or articles there that you caused to be published. A. None.

Q. What do you know as to the article around the trade, in here? A. Well they appeared in these trade magazines, these two did.

Q. What trade magazines? A. This particular picture appeared in the July-August eddition of Women's Apparel Reporter, 1944. July-August issue.

Q. What is Women's Apparel Reporter? A. A sequel to the Men's Apparel Reporter, published by the Reporter, New York City.

Q. Well I know but we don't know, at least I don't, about what the Men's Apparel Reporter is or the Women's Apparel Reporter. A. The Men's Apparel Reporter goes to Men's Haberdasheries and Department Stores selling men's wear, the Women's Apparel Reporter goes to Women's Wear buyers, the buyer of Women's Wear items.

Q. Are you responsible for the appearance of that article? A. No sir.

Q. Did you pay for it?

Mr. Horton: May I say, this is getting right at the same thing that we went over this morning this had anything to do with——

Judge Druffel: Well I think we have about reached the limit on it, in fact the utility and acceptance is best proven by the orders, and the witness has testified that the orders were such that they couldn't handle them themselves and they made the deal with Mack, now I think we ought to go on from there, because that's, this is just cumulative.

Judge Marx: It is cumulative to a certain extent, but it does show, If Your Honor Please, that to a remarkable degree the appearance of a brand new article in the style world and the tremendous acceptance of it by every national publication and even, if Your Honor please, this is something I don't think Your Honor is advised of yet, that advertisers of other things that had no interest in the sale of shirts whatsoever, picked up this brand new sensational, exciting style——

Judge Druffel: You're getting a little bit further than if you called the witness on this.

Judge Marx: That's right because he doesn't know all this.

Judge Druffel: I see.

Judge Marx: At present we have here a publication in Life Magazine where they advertise bicycles, they showed the bicycles, with this patented shirt, and numbers of other advertisers who were selling totally unrelated things to shirts picked up this new development in the apparel field and the figures taken in skiing or airplaning, or bicycle riding or things of that kind were all modeled in this new shirt, which goes beyond the ordinary acceptance——

Judge Druffel: It's too bad Mr. Zugelter, didn't know about that so he could put all that in his claims when he got his patent.

Judge Marx: I understand the claims are stated in technical language.

Judge Druffel: Well I think on that phase we've had enough.

Judge Marx: I am not going to press this point but this is so Your Honor will understand that I wasn't overstating the sentence, I want to show the witness a copy of Life Magazine for May 26, 1947, and ask you if you can identify the shirt that appears there in a Squibb Toothpaste advertisement?

Mr. Horton: And I object that it is immaterial and irrelevant here.

Judge Marx: Well let him identify it first and then object to it.

Mr. Horton: Well I think that there ought to be an end to it, he's entering the back door here all the things that he couldn't get through the front this morning. It's perfectly improper.

Judge Marx: Well I think that if I remember the Bible, if Your Honor please, that it says that there are many doors——

Judge Druffel: Yes but, you see, I think here that the objection here is well taken, and this is susceptible of more interpretations than one. It does show that one of the actors here had this shirt on but that might have been his only shirt and he had a job that day.

Judge Marx: The point is that this was not an isolated thing, in this advertisement we are able to show your Honor that there were a great many advertisements.

Judge Druffel: We'll concede here at this point that it helps make that ad more attractive, because of the shirt, that's what you want?

Judge Marx: Yes, that's the point of it, that it was a unique and therefore eye-appealing thing which is what your design patent is for. It was an eye-appealing design and was seized upon by the public as catching the eye of anyone who saw it.

We'd like to have it marked for identification.

(Plaintiff's Exhibit No. 6, witness Brohard, was marked for identification.)

By Judge Marx:

Q. Now can you state what your sales were, without the books? A. Approximately. You mean year by year?

Q. Well as nearly as you can yes, we can check it up more accurately from the books, but the Judge has stated that public acceptance is best shown by the sales, now state approximately what those sales were, not the Mack Sales, or Marlboro, but yours.

Mr. Horton: I have no objection to any summary here or anything like that but I think that if its in books the figures ought to be given rather than guess at it.

Judge Druffel: Well suppose we do this.

Judge Marx: Well I understand he knows pretty well, and can state them.

The Witness: No, I don't, I don't know my sales.

Judge Marx: All right. We'll get them from the——

Judge Druffel: All right, then stipulate that those were the sales.

By Judge Marx:

Q. Now when did the shirt that has been designated here Exhibit 1, appear as far as you know in Cincinnati? A. Well I think we have a sales slip to show when we bought one, but to the best of my recollection I think that the first

shirt marked Exhibit 1 here at Squires in either late '47 or early '48.

Q. Can you take Exhibit 1, and—Mr. Behr, would you step up here just a minute? Would you mind taking your coat off? Can you point out, using the garment on a man, I think this is a Corsair shirt that Mr. Behr has on, that correct? Using Mr. Behr as a model and using Exhibit 1 there, can you point out the differences if any, first in design, and secondly in manufacture, between the Corsair shirt and your patented shirt?

Judge Druffel: Now you say this is a Corsair shirt that you have on.

Judge Marx: Yes.

Mr. Behr: This is a Corsair shirt.

Judge Druffel: Yes, all right.

By Judge Marx:

Q. Just take design. A. There is no difference in the design of this shirt of Number 1, as compared with the shirt Mr. Behr has on, with the exception of the pocket, which is a device used by many manufacturers that might want to copy a patented item.

Q. Is there any difference in design between the shirt which Mr. Behr has on, Exhibit 1, and your patented shirt? A. None whatsoever.

Q. I wish you would take the Utility Patent No. 2428198 and point out if there is any difference between the Corsair shirt and your shirt—I'm not talking about workmanship now but the features of the patent, and the features of the design patent.

Mr. Horton: Is this shirt on this man the same as the other shirt?

Mr. Behr: Well its marked Corsair, but they are not as identical in——

Judge Marx: He'll take it off and let you examine it.

Mr. Horton: I don't care only one of them is in evidence and the other isn't.

Judge Druffel: Well the shirt that Mr. Behr has on is a Corsair shirt and Exhibit 1 is a Corsair shirt, now the question is as I understand it, are there any features on this Corsair shirt that is not included in this patent 2428198, is that the case?

Judge Marx: That's right.

By Judge Marx:

Q. Limiting yourself now to the claims of the patent, I am not talking about the details in manufacture. A. So far as the claims of the patent go, the construction of this shirt is, I would say, virtually identical to mine, with the exception that on Exhibit 1, the zipper has a continuing diagonal line, whereas on my shirt the zipper stops here at this point and goes straight down. The construction of the pocket is different.

Q. Well what about the details of manufacture. A. Of construction?

Q. Yes. A. The details of construction both on Exhibit 1 and the shirt that Mr. Behr is wearing are much cheaper construction, inferior construction to what our shirts—this shirt has double needle stitching.

Judge Druffel: Well that's not in the patent, is it?

Judge Marx: No. My only purpose was to show that although they copied the claims of the patent that they degraded the thing by introducing a cheaper manufactured item on the market.

Mr. Horton: There is no charge of unfair competition.

Judge Marx: Well this isn't a matter of unfair competition, its a matter of damage by the infringement, and the method of infringement. All right, Mr. Behr, you may step down.

* * * * * *

Judge Druffel: Proceed.

Judge Marx: I wonder if the other side, if Your Honor please, will admit that the Spectator Sportswear Company of Chicago, control this litigation.

Mr. Horton: I have never spoken a word to anyone in Spectator Sportswear but I would say this, the Spectator Sportswear Company has undertaken the defense of this case on behalf of Squires, Inc., and is paying my fees, I know that. And I am saying I am the counsel that is directing the defense.

Judge Druffel: That answers the question, doesn't it?

Judge Marx: I think it does and I think in view of that fact we move that the Sportswear, the Spectator Sportswear Company, Inc., the corporation organized under the laws of Illinois, be made a party defendant to this case.

Mr. Horton: It cannot be made a party because it is outside the jurisdiction.

Judge Marx: Well as I view it, if Your Honor please that they come into the jurisdiction by taking over the control of this litigation.

Judge Druffel: Well——

Judge Marx: They're here, represented by their counsel, they're paying the fees for the defense of the case retaining the lawyer, they are present in the courtroom, and the Courts have so ruled, and we have a number of authorities if Your Honor wish.

Mr. Horton: The Spectator Company is not present in this case, the Spectator Company is paying me to defend Squires, Inc., in this case. Now it is very very common as Your Honor knows, in patent cases for manufacturers to defend customers and to pay for the defense of the case but that does not make them a party to the lawsuit and it doesn't bring them into the jurisdiction and if they

are outside the jurisdiction they are not subject to the service of process and can't be made a party.

Judge Druffel: That would be my ruling at this point.

Judge Marx: Mister—we wish to reserve an exception to that ruling, also more particularly plead leave to ask Your Honor to reconsider that matter on the state of authorities when we submit later on the appropriate authorities, and that will be in the record.

Judge Druffel: Well we've had a number of cases here, I believe Mr. Zugelter was in some of them too where the defendant in the courtroom was purely nominal but the others who were defending the suits, and I have an idea that they were pooling their interests, they couldn't be made party.

Whereupon,

Nathan Kaplan

was recalled as a witness, and having been previously duly sworn, was examined, and testified further as follows:

FURTHER CROSS EXAMINATION

By Judge Marx:

Q. Mr. Kaplan, you were to produce additional correspondence this morning you said was in the possession of your lawyer, and that your lawyer was Harry Burns? A. That's right.

Q. He's lawyer for Squires? A. He's my lawyer.

Q. He's not here? A. He's not here.

Q. And is taking no active part in the case? A. That's right.

Q. Have you obtained any additional correspondence from him? A. I have one letter here.

Q. Well this is a letter written to you by our firm, dated December 31, 1947. We will offer the letter in evidence as an exhibit.

Mr. Horton: No objection.

(Plaintiff's Exhibit No. 7, witness Kaplan was marked for identification and received in evidence.)

By Mr. Marx:

Q. Were there additional letters from Spectator Sportswear, Inc., in which they agreed to identify you and take over the defense of this case? A. I believe there was.

Q. Where are those letters? A. With Mr. Burns.

Q. Well can you obtain those letters? A. I can't obtain them myself.

Q. You say you cannot obtain them? A. I cannot obtain them.

Q. Why not? A. Mr. Burns wrote the company, I think its between Mr. Burns and Spectator or the lawyers in Chicago.

Q. Is Mr. Burns in town? A. He was yesterday.

Q. Judge Marx: Well if we have to if the Court please we'll issue a subpoena for Mr. Burns but I should think that the witness here could secure those letters, pertaining to this lawsuit.

Judge Druffel: Well he said he couldn't and I can see why he couldn't as Mr. Burns probably figures they're his and the question of privilege may arise, I don't know, but at any rate we will have to be governed by the witness' answer here at this time.

Judge Marx: Well I am willing to accept it for the present but I see we will have to issue that subpoena, but if he is out, if we run into difficulty on that score we will have to ask Your Honor to make some further order.

Judge Druffel: All right.

Judge Marx: We haven't come to that point as yet.

By Judge Marx:

Q. In any event you do know that there is an agreement whereby Spectator Sportswear, Inc., has agreed to in-

demnify and hold you harmless from any loss in this case, and take over and defend the case at their expense? A. That's right.

Q. And you have committed your interest entirely to Spectator Sportswear, Inc.? A. That's right.

Q. And they are in control of the case? A. That's right.

Mr. Horton: Are you going to ask Mr. Kaplan back here at any further time?

Judge Marx: Well that depends upon these letters.

Mr. Horton: I did have some questions I might ask him but those are a little out of order, he might not have to come back here again, he's been here twice.

Judge Druffel: Well do you want to ask him some questions?

Mr. Horton: May I sir?

REDIRECT EXAMINATION

By Mr. Horton:

Q. Mr. Kaplan, how long have you been in the clothing business? A. Since 1920.

Q. And how long have you been employed by Squires, Inc.? A. Since September 25, 1940.

Q. In that time has that company handled shirts of various kinds as part of its stock? A. Originally we had the department leased, later we took it over.

Q. When was that that you took it over? A. In 19—, I believe in 1943 or '44.

Q. In your experience in men's furnishing business have you noted any particular trend with respect to demand for sports shirts? A. Previous to the war there was very little demand for it but since that and during the latter part of the war when we couldn't get dress shirts it seemed to take hold and now its a big thing.

Q. Is it a substantial proportion of your shirt business? At the present time? A. It is a substantial proportion of the shirt business.

Q. Do you handle other sports shirts than the Corsair shirt? A. Quite a few of them sir.

Q. What was the fact from your experience as to the availability of dress shirts during the war and immediately thereafter? A. We couldn't get much any kind of a shirt, dress or a sport shirt, until about 1947, now our stock is building up and we have all types.

Q. What can you say as to the difficulty of selling shirts during the war period and immediately thereafter? A. If you had any kind of a shirt that had a collar or even short sleeves or any type they would take it.

Q. Did the price make any difference? A. Price meant nothing, they never asked the price, you just could give them any kind of a shirt.

Q. Is your company, does your company at the present time have Corsair shirts in stock? A. We do.

Q. Does it have other types of sports shirts? A. We have other types.

Q. Do those other types of sports shirts sell for as much as ten dollars? A. They do.

Mr. Horton: That's all.

RECROSS EXAMINATION

By Judge Marx:

Q. Mr. Kaplan, is there any representative of Sportswear, Inc., now in Cincinnati? A. I don't know, I think there is.

Q. Who? A. Is Mr. Freeman?

Mr. Horton: He's a lawyer. A. He's an attorney, then there is not.

Q. Well isn't Mr. Freeman connected with Spectator Sportswear, Inc.? A. I don't think so.

Mr. Freeman: I am here purely in the capacity of an attorney for the Spectator Sportswear Company.

Judge Marx: Who is the Freeman connected with Sportswear, Spectator Sportswear.

Mr. Freeman: Friedman?

Judge Marx: Isn't some member of your family connected with Spectator Sportswear?

Mr. Freeman: No, sir.

Judge Marx: Well I don't care to ask Mr. Kaplan any questions at this juncture.

Judge Druffel: All right, you may step aside, next witness.

(Witness excused.)

Judge Marx: Call Mr. Talkin.

Mr. Horton: Are you through with Mr. Brohard?

Judge Marx: No I'm not but these out-of-town witnesses I thought we could take first.

Whereupon,

Milton H. Talkin

was called as a witness, and having been first duly sworn, was examined and testified as follows:

Judge Marx: My colleague has reminded me that in view of the last answer to the question on Direct Examination that I should renew the motion to make Spectator Sportswear, Inc., the party-defendant to this case.

Mr. Horton: But you haven't changed any of the facts that they are not at present in the jurisdiction.

Judge Marx: Well we'll present, I suggest that before Your Honor rules on it we have an opportunity to present the law. We don't have it right here at our finger tips.

DIRECT EXAMINATION

By Judge Marx:

Q. Will you state your name? A. My name is Milton Talkin. T a l k i n.

Q. And where do you live, Mr. Talkin? A. I live in Baltimore, Maryland.

Q. Give us the street address. A. My home address is 3406 Copeley Road. Business address is with Marlboro Shirt Company, Lombard and Paca Streets.

Q. Would you give us your age? A. I am 42 years old.

Q. And at the present time are you an officer of the Marlboro Shirt Company? A. I am not an officer of the corporation, I am Sales Manager in charge of salesmen, territories and distribution of the Marlboro Shirt Company.

Q. Before we come to the shirt business as such in your connection with it, I ask you if you are also a member of the worthy profession of the law. A. Yes I am a member of the Bar, I practiced law for 20 years before I went in the shirt business. I was Assistant United States Attorney for the Maryland District from 1931 to 1934, and I think I was doing, well just about all right but during the war the Marlboro Shirt Company, which is my wife's family, that is they are interested in it, were doing some expanding and I did a little traveling for the purpose of acquiring factories and getting interested in the business and I did. Since January of 1947 I have devoted my time fully to the shirt business, and I'm really no longer practicing law.

Q. That helps, at least as to the question of what we are going to do with all the lawyers in America. A. It don't mean that I'm too happy its just that I have—I enjoyed myself practicing.

Q. Well now, coming to the shirt business will you describe the Marlboro Shirt Company, how long its been in business, where its located and what it does. A. Marlboro Shirt Company is the company with the trademark Marlboro that has been in existence to my knowledge, according to information and so forth, being with the company and participating in advertising and one thing or another, for slightly over fifty years. The present people connected with the company, those who own it and own its stock and are operating it now have had the company since 1922, so that my knowledge would be more extensive from about that period. I married a daughter of one of the owners in 1929, and know more about the company of course from my personal knowledge since 1929.

Q. Well since 1929 what is the nature of the business of the Marlboro Shirt Company? A. Their business is that of manufacturing dress shirts and sports shirts, and outer wear, outer sport wear, that's a business that's continued uninterruptedly for the whole period and advertised extensively the Trade name Marlboro, and the products of course that the company produces, the distribution is nationwide, sales are made in every state of this country, there is some distribution out of the country. We sell in Canada and are selling also in Hawaii, Puerto Rico, Mexico and some of the South American countries. The foreign distribution is not too extensive but there is some foreign distribution.

Q. Do you sell any large distributor of merchandise in Canada? A. Yes, we sell T. Eaton Company, that's the name that I know specifically, I don't know of any other at the moment, I think that there are others.

Q. Is Eaton one of the largest of the Canadian stores? A. Yes, sir, it is.

Q. They have stores in Toronto and throughout, chains —— A. To my knowledge throughout Canada, I don't know just how many, Toronto and——

Q. To what extent is the Marlboro Company engaged in the sports shirt field? A. This is I would very extensively in sport shirts, Marlboro according to talk in the trade, our own interest in manufacturing and the nature of the work that we do, is quite a big large factor in the sport shirt business. We style our own merchandise, always interested in ideas that others have developed, not, we are really not limited in the kind of garments that we produce, its——

Q. Well what I meant to ask you directly is, are you large manufacturers and sellers of sports shirts? A. Sports shirts we are one of the leaders in the sport shirt field, including all of those who manufacture sport shirts.

Q. And when did you first, when and how did you first become acquainted with the shirt manufactured by Cavu Clothes, Inc., covered I believe at the time if I might lead for a minute there was a, the patent had not been granted. A. Now according to my recollection, having an interest in the matter personally, I remember the grant, the patent having been granted on June 10, I think it was 1947. I remember that period of time because we were quite concerned about the patent and its granting, and prior to that, prior to June 10, 1947, according to my recollection there was considerable demand from our retailers and from our men of course who serviced the retailers for us to put in a shirt like the Cavu shirt. The Cavu Shirt was known to us at that time because it had been brought to our attention by our salesmen and by the retailers, this shirt with the diagonal zipper which finished its closure under the collar, and presented this unbroken front, this

expanse you could wear a coat over it and so forth, I suppose the shirt has been described in these proceedings, has it?

Judge Marx: It's here. A. (Continuing) But that's the shirt, the Cavu shirt, our retailers wanted it and our men who had this constant demand on them by the retailer they wanted to put it in too, they wanted us to make the same shirt, and after repeated, after they got after us for a while we looked at the shirt——

Q. Where did you obtain the shirt? A. To my recollection one shirt that I saw was obtained from Stud's Menswear in New York City. I don't remember which particular shop I think there were two shops that Mr.——

Q. At any event you obtained a Cavu shirt and then what did you proceed to do with reference to that shirt? A. We obtained a Cavu shirt and we then proceeded to manufacture samples according to the Cavu shirt, with the slant zipper and the triangles and the leather darts at pocket.

Q. Let me interrupt you just a minute, after you started to look at it and see what you could do with reference to selling it, were you apprised of the fact that there was an application for a patent pending? A. Yes, it seems to me that the label had the word Patent Pending in it. The shirt we had had the words Pat. Pend., I believe either that or spelled out, but, yes—we knew from the label, or we knew from information, or retailers' talk or something like that there was an application for patent pending, and we proceeded to make our samples and to experiment with other garments that would at that time avoid any problems on our part if we were infringing on a patent, whether it happened to be an application at that time or a patent that was granted. We didn't want to be involved in any

proceedings of any kind we didn't want to have a problem, because when we get into the manufacture of a number we go into it because in our opinion it would prove to be a substantial item. In other words, the mere manufacture of a number because it involves several hundred dozen, while it may be an item, isn't considered too important by us, because in setting up your lines to make a number that, it's just like with tooling in any industry you have got to get your girls accustomed to turning out a garment and you can turn out a garment at a lower cost and do a better job if you produce it in several thousands of dozens. And so any number that we go into is a number that we consider before actually putting it into the line, will be a number that will sell at least in several thousands of dozens, we'll say it that way. And so, getting into an idea like that where the label had the word Patent Pending and where we knew, at least had information that there was a Patent Pending, we didn't want to become involved, although it appears later that we did because we were experimenting with the shirt, now I don't know whether——

Judge Druffel: You did later enter into an agreement with them?

The Witness: Yes, sir.

By Judge Marx:

Q. I don't think I'll come to that, but I want you to tell the Court what you did in an effort to construct or design a garment which would not conflict with the Cavu or patent.

Mr. Horton: Well I object to that as immaterial here.

Judge Druffel: No. Well let's bring it right up to the signing of the agreement then what happened after that.

The Witness: Well where that came about was——

Judge Druffel: Well you better, I don't want to conflict with Judge Marx, I don't know whether he wants that.

Judge Marx: Well if Your Honor may have a misapprehension as to what I want to show, I want to show the uniqueness of this design by showing their endeavor to rearrange or design what they did in an effort to construct a garment or a shirt along similar lines but yet not the same. Showing the novelty of this particular shirt.

Judge Druffel: Well ask him directly about this, we are not interested, either what you were trying to do at the time was skirt the design patent——

The Witness: That's right, we constructed the garment——

Judge Druffel: Well you see there's an objection to that and I have to sustain the objection, you can approach the question directly but I think here that we are not interested in their efforts to evade the design patent.

By Judge Marx:

Q. Well had you or your designers, prior to seeing the Cavu shirt, as you call it, ever seen a similar——

Mr. Horton: Well I object to that, its immaterial as to whether he, certainly he can't say about his designers.

Q. Prior to seeing the Cavu shirt, or the design of the Cavu shirt had you ever seen anything like it in the sports shirt field?

Mr. Horton: I object that it is immaterial this man may have seen it.

Judge Druffel: Well he may answer yes or no.

The Witness: No, sir, I had never.

Q. Was it new and different to anything you had previously, which was previously sold commercially in the sports shirt field.

Mr. Horton: I object to that.

Judge Druffel: The objection will be sustained.

Q. What were the features which appealed to you as being new and novel about this shirt?

Mr. Horton: I object to that as being immaterial.

Judge Druffel: The objection will be sustained.

By Judge Marx:

Q. Well what were the features of this garment, known as the Cavu shirt, which caused you to want to make it? A. There was a symmetry to the design, an unbroken front so that when you wore a coat there was this exposed panel, but an unbroken panel; there was a certain style to the garment when you wore a coat over it, and when you didn't wear a coat there was a line which ran diagonally to a point when there was a break for the straight line, so that if the garment were worn out of the trousers there was as I say, this symmetrical look to the design, diagonal line and straight down, that appealed to a style sense. To see the garment with that kind of a line to it. We tried to avoid that line but couldn't.

Mr. Horton: Well I move to strike that, this remark about whether he couldn't avoid it.

Judge Druffel: Objection will be sustained. Go ahead.

By Judge Marx:

Q. Go ahead with your description of the shirt. A. I can explain that we manufactured samples of other garments, we made a garment, we had this garment before us, we made another garment from which we took the——

Mr. Horton: I object to this and——

Judge Druffel: Yes. You're asking him to describe this shirt. Now he's describing something he attempted to make outside of that.

Judge Marx: Well I was going to ask him whether any of these others shirts had the same style appearance.

Mr. Horton: And that would be quite immaterial.

Judge Marx: I don't think it is.

Judge Druffel: Well the point of it is that it would be absolutely contradicting your patent if they did.

Judge Marx: Well I agree with that, well it's not too material, I won't bother about it.

By Judge Marx:

Q. What about the utility of this shirt? A. Well the shirt had, I can only add sir that the shirt had great acceptance, it was a very good item, the retailers wanted it and they wanted this one.

Q. Well then now after you had acquired this shirt and examined it and so forth what did you then do with reference to applying for a license to manufacture it? A. We communicated with the Mack Shirt people here in order to obtain rights to manufacture the same kind that they were making.

Q. And did you obtain such rights? A. Yes we did.

Q. And on a royalty basis? A. That's right, sir.

Q. The royalty payable to whom? A. Payable to Cavu Clothes.

Q. Not to Mack? A. No, sir.

Q. You paid no royalty to the Mack Shirt Company? A. No, sir.

Mr. Horton: Just a minute, if this license is a written document I think the license ought to be produced rather than the man's testimony about the contents.

Judge Druffel: Do you have a copy of the license?

Mr. Tjoflat: They already have a copy of that Your Honor, they asked for it and it was supplied. I'm sure that was the one supplied.

Mr. Horton: Well I beg pardon, I have a sworn statement from Mr. Brohard that the Marlboro Shirt Company did not have a license.

By Judge Marx:

Q. After you got the license, incidentally what material does that, first what class of shirts, did that cover, both men——

Mr. Horton: If Your Honor please, I renew the objection that if this is contained in a written document I think the document ought to be produced and the document will speak for itself as to the scope of the license granted.

Judge Druffel: Well is there such a document? Well is it in court?

Judge Marx: Well this doesn't relate to that, the question is what class of shirts do they make as regards to the people who wear them? In other words, men, women, children, girls, boys, or what.

The Witness: We make men's and boys' shirts, we don't make any ladies shirts, we don't make any ladies apparel, just men and boys.

By Judge Marx:

Q. Do you have any license to make ladies shirts? A. No, sir.

Q. Or girls' shirts? A. No, sir.

Q. It's strictly limited to the male——

Mr. Horton: Now I object to this as to the license, if you are asking him now about what the license is I think that the document ought to be produced.

Judge Druffel: Well isn't it sufficient for the purpose of this case that they did obtain a license to manufacture Cavu shirts, and that they are paying a royalty and that they are still making them and let it go at that? Without going into the detail? It seems to me——

Judge Marx: I think so, this was more or less in anticipation of their opening statement that Mack and Marlboro had exclusive licenses and the fact is that while they weren't exclusive they may be exclusive within a limited field, namely, men, and boys and not women or girls, and also exclusive also in a fabric field, which is another limited field, they can't make wool shirts, for example, they have

no license to make them, Cavu Clothes has retained the full rights with respect to the matters that were not licensed.

Mr. Horton: That's why the particular written license is important.

Judge Druffel: Well I think that that's all there's going to be talked about as far as the license is concerned at this time.

Judge Marx: That's most of it.

By Judge Marx:

Q. Now what was your commercial success in the marketing of this item as shown by your sales, have you got your sales, records? A. It was very big, very big. I know from the records——

Q. Have you got your records with you? A. I don't have the records, I had charge of production and what we call the Cavu it was our Spitfire, and we marketed it in the name of Spitfire.

Q. Yes, well—— A. I had charge of production, I knew the sales, I knew the way the sales were running, I knew when we started to deliver, I knew the set up of our factories, how we set up one factory specifically for the purpose. As a matter of fact when we handled deliveries of the item we handled it as a separate and distinct unit of our whole operation, it was that important. We had one shipping division, devoted only to the shipment of what we called Cavu which was our Spitfire garment, made exactly the same and on, under our right to make them. In the first period, which was the period from October 1st., until the end of December, 1947, we delivered approximately 5,000 dozen. We didn't speak of them, I have the figures of 5,000 dozen, but we spoke of them as units as that was the way we handled the Spit-

fire operation, sixty thousand units that we delivered from October ist., to the end of December, 1947. And from January 1, 1948 to the end of December 1948 we delivered approximately 300,000 units, and it was the largest, the Spitfire operation which was the Cavu, was the largest single operation we had in our business from October 1, 1947 until December 1, 1948.

Q. Can you give us some figures that show what that amounts to in dollar volume. A. Well in dollars and cents in 1948 was a million and a half dollars, this one item was a million and a half dollars in volume of our total shipped volume in 1948.

Q. At what point, did the sales subsequently fall off? A. Sir we had this kind of a history with Cavu, when we were producing beginning the early part of October, that is we started producing of course prior to October, 1947, in order to get the lines working and so forth, but from October 1, 1947, I beg your pardon, taking October 1, 1947 as a starting point, we couldn't supply the demand that there was for the garment. We had a terrific demand, we had a very big demand, as a matter of fact describing this shirt was what the retailer called the shirt that walked out over the counter, he did not have to sell it, and that sort of describes it, it just walked out. We couldn't supply the demand in the early period, beginning October 1, 1947, but in that period we delivered as I said approximately 5,000 dozen. Then there were gradual inroads being made in the, in our manufacture, which that of Mack and Cavu——

Mr. Horton: Well I object to what happened to other people, you were asked the question as to whether it fell off I think you should, I object to his answer.

Judge Druffel: Well all right——

The Witness: I didn't and don't know anything at all about the Mack and the Cavu operation, and I don't even know the figures or anything, I only know our operation. There were inroads being made in our business, I have to say it that way, and if I've said anything out of line I'll have to take it out. There were inroads being made in our operation. Now there were people that were making an infringing product, selling it to retailers and getting a distribution and as this——

Mr. Horton: I object to that answer and move to strike it, that other people were making an infringing product.

Judge Druffel: The objection will be sustained.

By Judge Marx:

Q. Well in what period did your business begin to decline? A. As nearly as I can fix the period I would say in May or June, the, April, May and June of 1948. The start of October '47 we had a sort of average selling with the demand greater than we were selling. The first period, January through March of 1948, we had our best period, then there was a slackening in demand through that period. At one stage we actually were concerned as to whether the demand would fall off entirely. That was in this period of April, May, June. In that period we delivered between five and six thousand dozen, the greater part of which I believe was in April and May, but the demand took up again and maintained in July, August and September, just about the same as it had been in April, May and June, with just a few hundred dozen maybe less, and then after September, beginning October 1, '48 at the end of the year it dropped considerably, several thousand dozens, I believe. At this stage of the proceeding which is the period January 1, 1949 to date, we are not manufacturing Cavu at all.

Judge Druffel: Did you cease manufacturing altogether now?

The Witness: We are shipping but not manufacturing.

Judge Druffel: You mean you have a stock on hand?

The Witness: Well we had some stock sir, but the, well to describe it one way the competing manufacturers selling the same garment where we have a royalty arrangement which makes a difference of price at which the garment has to be marketed, allows the other manufacturer to make the garment at a lower price than we can make it, and that interference has interfered with our business.

By Judge Marx:

Q. Are you familiar with the shirt known as the Corsair shirt, made by the Spectator Sportswear? A. Yes, sir, I am.

Q. I'll show you Exhibit 1, and, which is a Corsair shirt, and ask you if that is a shirt which you referred to as an infringing shirt?

Mr. Horton: I object, the statement was stricken from the record. Now I don't want any conclusions on that.

The Witness: Well I wouldn't say its a conclusion, just maybe loose language, I don't know, its just a discussion.

By Judge Marx:

Q. In any event is that one of the competing shirts that you referred to as having taken your market away? A. This is a Corsair shirt, I can't direct my attention specifically to what item we have had competition with Corsair, they're one of the competitors on this particular model. This looks like a shirt that I saw when we were first considering making the shirt to try to get away from the Cavu garment.

Q. Are there other shirts which have imitated the, or which are made similar to the patented shirt?

Mr. Horton: I object to that as immaterial and irrelevant, the only question is between the parties here——

Judge Druffel: Its a question between the parties here.

Judge Marx: You may cross examine.

CROSS EXAMINATION

By Mr. Horton:

Q. Mr. Talkin—— A. Yes, sir.

Q. Up until the middle of 1948, I understood you to say you sold all that you could produce of what you call Cavu shirts, is that right? A. That's right.

Q. And that it was in the latter half of 1948 that the demand fell off, is that true? A. There was a tailing off beginning either April, May or June, I wouldn't know the exact latter half, it became noticeable in the second quarter, now whether it was the last month or so I wouldn't say, but has been substantially, right, but a little different.

Q. Your high production then continued for approximately eight months, is that true? A. Relatively, yes, sir.

Q. And now you don't manufacture at all? A. We're not making any at this moment, no sir.

Q. Are you making other sport shirts at the present time? A. No sir, we aren't.

Q. Have you at all times made other styles and types of sports shirts? A. Yes sir, we've made a great many, great many types and styles of sports shirts.

Q. While your production of what you call the Spitfire shirt was at its peak, were you also producing and selling other styles or sports shirts? A. Yes sir, we were.

Q. Have you ever, does your company alter the design of its shirts from time to time? A. Yes sir it does.

Q. Common thing, isn't it, for a sports shirt style to go good for a while, taper off, and the company change to another style shirt? A. Yes sir, it is.

Q. The shirt which you manufactured and called the Spitfire shirt is one which I believe you described as having leather darts on the pocket? A. Yes sir.

Q. And that was like the pocket styling of the Cavu shirt? A. Yes sir.

Q. What did you sell your Spitfire shirt for at the retail price? A. Retail price it's $7.95, $8.95.

Q. $8.95? Was that a standard fair-traded item, with that standard price all over the country? A. No, retailers, they could sell the shirts at whatever price they elected to sell them, the mark-up on the item usually the retailer takes a 40 per cent mark-up, that is 40 per cent of his selling price, and with the cost of making, the cost of the goods, the goods figured about $66.00 a dozen, and in the average range, our shirts are in the main are in the average price field.

Q. But you didn't have any fixed price at which your retailers sold the shirt? A. No sir. Suggested prices.

Q. And they could sell at $8.95 or $6.95 or whatever they wanted to sell them? A. That's right.

Q. Your company has a written license under the two Brohard patents, is that true? A. Yes sir.

Q. Who granted that license to you? A. Mack Shirt Company.

Q. That was a sub-license granted to you by Mack Shirt Company? A. That's right.

Q. Who signed that license for the Mack Shirt Company? A. I believe Mr. Mack, Richard J. Mack.

Q. When did you obtain that license? A. I would say it was sometime after June 10, 1947.

Q. 1947? A. Yes sir. If that was the date of the granting of the patent, sometime shortly after that, maybe a month, just a month it may be two or three months or four months.

Q. Then you did have such a license in May of 1948? A. Yes sir.

Q. Do you have a copy of that license here? A. I don't have it in court, sir.

Q. Will the plaintiff produce a copy of the Marlboro license?

Judge Marx: As I understand it, Your Honor please, there are some commercial matters which need not be revealed to the competition and we would want to eliminate those things in anything we might want to exhibit in that connection.

Judge Druffel: Well I think that was the ruling early in the proceedings that unessential parts that might be used for competitive purposes were not available.

Mr. Horton: Well that I would certainly say is so, but what part could there be——

Judge Druffel: Well I don't know you see they——

Judge Marx: Well royalty is certainly one.

Mr. Horton: That certainly is a material element in this case what the royalty is that is paid by the licensee.

Judge Marx: Where is it material?

Mr. Horton: Well if it's free or very low.

Judge Marx: Well it's not free.

Mr. Horton: It certainly makes a difference as to whether or not they took a license.

Judge Marx: It's not free and it's substantial.

Mr. Horton: Well I was just never in a case before where someone is trying to prove commercial success that hesitated to show a substantial royalty was received from the licensee, I don't care anything about how much it was.

Judge Marx: Well it is competitive information which is not at this time material or necessary to show.

Mr. Horton: I don't see how anybody could use that information to hurt you and if they did——

Judge Marx: Well that's for our clients to decide.

Judge Druffel: How does it become material to your defense here?

Mr. Horton: In the first place if it is not a substantial amount then there could be some reason why they might have taken a license because they could market and promote the sale of the shirt. The thing I want to know mostly about this license is the nature of the grant.

Judge Druffel: And the other is the percentage of the royalty?

Mr. Horton: Yes.

Judge Druffel: Well I don't see that there's any objection to that.

Mr. Tjoflat: If Your Honor please I understand that the matter of royalty would only have a bearing on this situation in case the patent is sustained and then we go into an accounting, I don't see that it has a bearing on this situation.

Judge Druffel: Well its a question or whether it is substantial or not substantial as to, that might affect the matter here, now he has at this point asked as to the nature of the grant, of course you see the Court's in the dark as to the defense at this point, and now what is the nature of the grant?

Mr. Horton: Well in the meantime I could go on.

Judge Druffel: Well let's see if we can determine this I don't think there should be any question about it.

Judge Marx: Just a moment please, if Your Honor please, it's a matter for our clients to take care of, they

know this business and we don't know it except as they tell us, and we want to consult with them and see if it would be revealing.

Judge Druffel: The point of it is everybody in the trade knows what they're buying from Marlboro shirt and I assume that that's based on the nature of the grant, I don't see why there should be any mystery about it.

Judge Marx: Well we just want a minute to talk this over and see.

Judge Druffel: All right.

Judge Marx: Mr. Brohard came up with so much of the license agreement as covers the nature of the grant as to what he said, he said we have no objection to showing them so much of the license agreement as relates to the nature of the grant which is what he said he wanted, and we have no objection to showing them so much of the license agreement as relates to the amount of royalty, which is what he said he wanted.

Mr. Horton: You say to the amount of the royalty?

Judge Marx: Yes, as to the royalty.

Mr. Horton: Well what do the object to, why not produce the item?

Judge Marx: Well because it has a list of customers in it and other things of that nature, which we don't care to disclose. Well as the gentleman says here, it represents——

Judge Druffel: Well that's substantially the agreement except the list of customers?

Judge Marx: Yes.

Mr. Horton: I didn't know there was a list of customers in it and of course I don't want to——

Judge Marx: Customers' exclusive.

Judge Druffel: Well that of course, will be excluded. That will give you everything you want. Now do you want

to proceed with the cross examination, and we'll recess in a little bit and then you can examine it.

By Mr. Horton:

Q. When you learned of the fact that there were Cavu, of this Cavu shirt, and you saw it was marked Patent Pending, you say you wanted to obtain a license, did you contact the Cavu Shirt Company? A. No sir, we didn't.

Q. How did you happen to contact the Mack Shirt Company? A. We had a letter from Zugelter & Zugelter, Patent Lawyers, advising us that we were infringing on an article on which they had a patent pending, and that time I think it was patent pending, and that we should not make an infringing article.

Q. Did they advise you that the Mack Shirt Company had a right to grant a license? A. I don't know whether they advised us that the Mack Shirt Company had a right to grant licenses, but I don't recall, maybe I do now that they represent Cavu Clothes, I'm not sure whether they represented Mack or Cavu, maybe they represented Cavu, and we had the letter and we came on to Cincinnati, after we were called, and letters, to arrange a meeting, to see whether we could get a license and we were then advised that Mack had a license with Cavu, and that if we'd take a license Mack would have to be satisfied, we'd have to take it from Mack.

Q. Who advised you that? A. A man by the name of Montie Brohard.

Q. Were you here personally at this? A. Yes sir.

Q. Did you have the negotiations with the Mack? A. Yes sir.

Q. Does your company manufacture dress shirts? A. Yes sir.

Q. How many dress shirts do you manufacture in a year? A. About 150,000 dozen or more.

Q. In a year a 150,000 dozen dress shirts? A. Between 150,000 to 200,000 dozen.

Q. And what is your production, total production of sport shirts? A. That's about the same, 150,000 dozen.

Mr. Horton: Well that's all I'll have for him except for the production of the license.

Judge Druffel: Well is this witness excused then, do you have any questions?

Judge Marx: I have one other question that I wanted to ask about.

REDIRECT EXAMINATION

By Judge Marx:

Q. Were you able to sell in the Cavu style, under your Spitfire label, some fabrics which would not sell in the conventional sport shirt? A. Yes sir, we were.

Q. For example. A. Well we had some 40 per cent wool, 60 per cent rayon cloths, at that time from which we had sport shirts already manufactured and styled, and they were not selling too well, they were not selling but were very fine goods, they just were not selling, so we manufactured that particular goods in the Spitfire and we sold the whole lot of it, about 1500 dozen in round figures, if I can remember it. We had part rayon, I think it was a 50-50 or it might have been 51-49 of a popular rayon in which we had the conventional sport shirt, and it was not selling at all, we had 100,000 yards to make upwards of 3,000 dozen, and we made Spitfire of that particular cloth and it was sold. At this time I would say we don't have any in Spitfire left in this cloth, nor do we have any of the others, as a matter of fact.

Mr. Horton: I have no other questions from him, Your Honor, but Your Honor it occurred to me about this license,

I have no desire to obtain the customers, but it would seem to me that if there is a restrictive covenant in that license, that Cavu could sell what customers and where and so on, it might be very pertinent, on use of the patent——

Judge Druffel: Is that a part of your defense?

Mr. Horton: No it isn't, I have never seen this license, I've got a sworn statement from Mr. Brohard, in answer to interrogatories that there was no license granted to Marlboro.

Judge Marx: By him.

Mr. Horton: It's certainly deceptive, I would say.

Judge Druffel: Well have you reached the point now where you want to examine this license?

Mr. Horton: Yes, Your Honor.

Judge Druffel: Well is this witness finally excused then?

Mr. Horton: Yes.

Judge Druffel: All right you're excused.

Judge Druffel: We'll recess at this point.

(Short recess.)

By Mr. Horton:

Q. You've looked over this copy of a license agreement between the Mack Shirt Corporation and the Marlboro Shirt Company that was produced here? Have you not? A. As I see it pretty quickly here it looks like the agreement between the parties——

Q. Except for the portions that have been torn off? A. That's right. They grant us the license at two per cent, for five years, in round figures, up to June, 1952, two thirds and enabled them to give us credit, there's a designation, under it that they have the right to cancel if we don't manufacture 750 dozen in six months.

Judge Druffel: I think that that's all.

By Mr. Horton:

Q. That is the—— A. Yes.

Q. Now there are certain portions of this license which have been removed? A. Yes sir.

Q. Now I understand that there are a list of customers, I don't, I am not going to inquire as to who those are, but is that, does that provision relate to your agreeing not to sell to certain customers? A. Yes sir.

Q. And is there a provision there, an agreement that Mack will not sell certain customers? A. No sir.

Q. It simply excludes you from selling to certain customers? A. Yes sir.

Mr. Horton: I think those portions might be pertinent, Your Honor, I don't care particularly to look at them but I think they ought to be submitted to the Court.

Judge Marx: We can't see how they can possibly be relevant to this suit, its merely an attempt by Spectator——

Judge Druffel: Well let me ask the witness——

Judge Marx: ——to ascertain what customers were involved.

Judge Druffel: Were you limited from not selling to customers that had been previously customers of Mack or Cavu, was that the idea, or were you just restricted from——

The Witness: Not all customers, Your Honor, the idea was that there were certain accounts of Mack that were known as what they called pilot accounts with whom they had done certain advertising job, and certain preliminary spade work, in the development of the shirt, and the promotion of the shirt, and in order to come in under the license we just agreed that those we had plenty of outlets to sell we didn't have to——

Judge Druffel: That's the limit of the restrictions?

The Witness: As to the accounts, yes sir.

Judge Druffel: I think that if that's the limit of the restriction then its all right.

By Mr. Horton:

Q. Well could you tell me what these fabrics are that are listed in schedule A? I presume that they are all non-wool fabrics, is that true? A. Yes sir, I would say these are all non-wool fabrics, Galey & Lord's, Beachclub and Fieldclub are two fabrics that Mack was using with which he had good success.

Q. Are those cotton or rayon or what type of fabric? A. I can't say except express the view that all these fabrics are non-wool, and as I remember it, the Featheroy and Zephyroy, I know are corduroys, I believe, they are corduroy, that's the Julie-Juilliard's corduroy, which they describe as Featheroy and Zephyroy. I believe that's true. There are Ramie Fabric's Soap and Water gabardines likewise handled.

Judge Druffel: Well wasn't it stated this morning that it was the non-wool fabric that you were to use?

The Witness: They were to be non-wools, up to 60 per cent, to go as high as 60 per cent wools.

Mr. Horton: They are listed here by trade names, Your Honor, and I don't know what they are.

Judge Druffel: Well then up to 60 per cent wool, they were limited.

The Witness: Mr. Horton I believe these were all, these were non-wool fabrics. I know the Ramey is a definite non-wool, that's a cloth they are developing now, very definitely a non-wool, gabardines, these are non-wool gabardines, this is rayon gabardine, soap and water gabardines are non-wool and Featheroy and Zephyroy are corduroys.

Judge Druffel: That's all right. Any further questions? By Mr. Horton:

Q. Now on the parts that are torn out of this, there are two parts torn out. Is there any other restriction, other than the customer restriction that you referred to contained in the original license? A. Yes sir, there are others.

Q. What is the nature of those? A. Let's see where the paragraphs are.

Judge Marx: All the provisions, if the Court please, with reference for example to the calculation of the price upon which the royalty payments are made, and stipulates the amount of the royalty and then it, as to discounts and so on, and we don't think, those are all trade secrets, that are not material to this case and certainly have no concern.

Judge Druffel: Well you're talking about unlawful restrictions?

Mr. Horton: That's right, Your Honor, and I'm asking about——

Judge Druffel: Well were there any unlawful restrictions that were in there that you know of? Do you know of any unlawful restrictions that were in there that are now clipped out? You're a lawyer and a former district attorney. Yes or no, are there or not?

The Witness: There are two clauses out, Your Honor, 7, there's 8, 9 and 10. If you will give me whatever's taken out.

Judge Marx: There's no objection to showing them to Your Honor.

Judge Druffel: Well let the witness see them, that's all right if he. (Papers handed to the Court.) Well I'd say there are no unlawful restrictions here.

Mr. Horton: Well I'll ask to have this marked for identification as Defendant's Exhibit A.

(Defendant's Exhibit No. A, was marked for identification.)

Judge Druffel: Are there any further questions of this witness?

Mr. Horton: No.

(Witness excused.)

Judge Druffel: Will you finish today, Judge Marx?

Judge Marx: Yes, I think so.

G. L. Ridenour

was called as a witness, and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Judge Marx:

Q. Mr. Ridenour——

* * * * * *

By Judge Marx:

Q. Mr. Ridenour will you state your name? A. G. L. Ridenour.

Q. Where do you live? A. Chicago, Illinois. 3314 Lakeshore Drive.

Q. And what is your present business? A. I am in the retail clothing business. President of the Baskin Clothing Company, Chicago.

Q. Are you an officer? A. Yes I am.

Q. What is your office? A. President.

Q. How old are you? A. 49 years old.

Q. How long have you been engaged in the men's furnishing goods business handling men's shirts? A. Approximately 26 years.

Q. And what is the nature of Baskins business? A. Baskins own and control two retail stores in the loop area of Chicago, and their business is the retailing of men's furnishings and clothing.

Q. Where are those stores located? A. The larger store is located on the corner of Adams and State, and we have another store located at 77 West Washington Street.

Q. Are those principal shopping areas in Detroit, in Chicago? A. Yes they are sir.

Q. And is Baskins one of the largest men's furnishing goods stores in the City of Chicago? A. Among the largest, yes sir.

Q. You handle sports shirts? A. We do sir.

Q. Did you in the course of your business become acquainted with the shirt manufactured by or known as Cavu, and covered by patents owned by Mr. Brohard? A. Yes sir.

Q. When did you first become acquainted with that shirt? A. In the fall period of '46.

Q. How did you become acquainted with it? A. I was approached by a representative of Cavu Clothes corporation and shown the shirt, and we bought a quantity of shirts on its initial showing.

Q. I'd like to ask you at that particular time, what time did you say that was? A. In the fall of '46, late fall, I think it was around November.

Q. Did you have the conventional sports shirts which were then on the market in your stores? A. Yes sir.

Q. And what was your experience with respect to the saleability of those shirts at that time? Sports generally. A. Sports shirts generally? There was quite a demand for all types of shirts as you know during the war period, and shortly after that and it seems at that time there was

a little lull in the retail demand for shirts of that character, and we were quite anxious to find things to stimulate our business.

Q. What was your observation of the Cavu shirt when it was exhibited to you as to its uniqueness or novelty in appearance style or design?

Mr. Horton: I object to that I think as calling for the conclusion of the witness.

Judge Marx: No I want a description of the Cavu?

Judge Druffel: You may ask the reaction when the shirt was shown and what impression it made on him.

By Judge Marx:

Q. Well what was your reaction when the shirt was shown to you and what impression did it make upon you? A. Well at that time I was merchandising the men's furnishing department and rescreening things that are shown to us and selecting them and buying them in our own humble way as to their potential sales value in our store and our acceptance, and due to the fact that we bought the shirt and advertised it we recognized the value that we thought it had.

Q. What value did you think it had? A. We thought it would be readily accepted by the customer.

Q. Just go on with the story from that point. A. We bought, would you like to know quantities?

Q. Yes, we would like to know exact quantities and figures and everything.

Judge Druffel: We'll take totals it's not necessary——

The Witness: You want dates?

Judge Druffel: No I think, just generally——

Judge Marx: Well I'd like the dates to show the growing demand.

Judge Druffel: Well '46, '47, that's all right.

A. According to our records, the purchase records, we first bought the shirt in October of 1946, and as I indicated before we bought those shirts from Cavu Clothes Company. At a little later date we had an opportunity to buy a quantity of shirts at a lower price from the Mack Shirt Corporation. An ad was prepared on that particular item and it was advertised in the Chicago Tribune and it sold quite readily. That was the ad was run I am quite sure in late November, that was, when the Christmas buying had started, and they sold out to the piece and we tried to get additional merchandise.

Q. You say sold out to the piece, what do you mean by that? A. Entire selling, I mean the thing was good, it had counter appeal, and the people seemed to recognize the style value it had, and told different expression, style expression from other shirts that we had in our stock, and they sold out, in response that we had to the ad in the Tribune. We started to negotiate with the Mack Shirt Company and the Cavu Shirt Company, in the latter part of '46 for additional goods and I couldn't get anything at that time, but I was able to buy additional goods for delivery in the spring of 1947. In the Spring of 1947 we used from the Mack Shirt Company 260 dozen shirts and from the Cavu Shirt Company approximately 90 dozen shirts, and the shirts from the Mack Corporation were retailed at $10.00 and those from Cavu were to retail at $12.95 to $19.50. In the Spring of 1947 we used 347 dozens shirts, that's over 4,000 units at a retail value of $46,000.00. And this merchandise was sold out quite rapidly, no odds and ends, it was a clean sell-out so we started to prepare our sales and our efforts for the fall season, because our spring experience was so good with the item in question. It was a substantial part of our total all-over sport shirt business.

In buying shirts for the fall period, we again negotiated with the mentioned vendors and were able to secure additional goods and for fall 1947 we used 250 dozen, or approximately 3,000 units with a retail value of approximately $40,000.00. That was $85,000.00 worth of total sales on that item for the year of 1947.

In 1948 we restudied the demand for the shirt and we had in the fall of 1947 encountered some competition on that type of shirt from other resources. Through other retailers there in the local area, and we restudied our sales potential and started to curtail our commitments. So in the Spring of 1948 we purchased from the Mack Shirt Company, 139 dozen shirts, and from Cavu we purchased about 60 dozen, which about 193 total dozen with a total retail value of $28,000.00.

In the fall period we restudied our demands and our potential and we had had terrific competition during that period from other retailers on this item and we bought, and was offered, we only bought 48 dozen shirts for the entire fall season of 1948 or approximately 600 units, a total of, retail value of $6,000.00. The total sales for that item for 1948 was $34,000.00 against $85,000.00 in 1947, so in 1949, the beginning of 1949 we purchased no shirts of that character and style, which gave us a sales experience of approximately 900 dozen at a retail value of $130,000.00 in the period that I have just gone into.

Q. Did you advertise this shirt to the public? A. We had rather a verbal franchise agreement with these two resources that they would not sell more people in that area to give us an opportunity to realize our investment in the shirt which we intended to promote and advertise in the Chicago Tribune, and I had a list of the ads as they appeared in the Tribune. In total we spent $11,000.00 in advertising of that item in the period I have revealed.

Q. $11,000.00 of your own money or did the Mack and Cavu participate. A. There was no cooperative advertising agreed upon, we spent all of our own money.

Q. No advertising allowance? A. No sir.

Q. It was all your own money? A. Yes sir.

Q. Have you any copies of those advertisements here? A. I have two. We ran many more.

Judge Marx: Well I'll offer this summary of the list of their advertising. Will you mark this exhibit. Exhibit 8, the list of the advertising.

(Plaintiff's Exhibit No. 8, witness Ridenour, was marked for identification and received in evidence.)

The Witness: This is one that appeared in the Daily News, February 18, 1947. On the Flightmaster, that's the Mack shirt, and here's a sample of our advertising which appeared in the Tribune.

Judge Marx: Just a minute, will you mark this Exhibit?

Mr. Horton: If Your Honor please, I think that the advertising itself is immaterial here. The amount that was spent for advertising is in the record.

Judge Druffel: Well it's part of the history of the—it will be received, that's all right.

Judge Marx: We will offer the two ads produced by the witness in the Chicago Tribune as exhibits 9 and 10 as examples of the advertising referred to in the list.

(Plaintiff's Exhibits No. 9 and 10, witness Ridenour, were marked for identification and received in evidence.)

By Judge Marx:

Q. I notice you referred to the difference in price, both retail and wholesale of the Mack shirt and the Cavu Shirt. Was that difference due to workmanship or the type of material? A. Material, principally on the white shirt.

As I understand it the workmanship was the same, or upon the same quality.

Q. You also testified to the fact that you met with considerable competition during the period that you referred to that caused you to reduce the sales; from what sources was that competition, I mean what type of, whose garments were they? A. Well as I remember it there were three or four, one was Spectator, Amboy I think was another one, and later on I think Shirtcraft, a concern by the name of Shirtcraft had one out, and whereas there were only three people selling the diagonal zipper type shirt in the loop area of Chicago in the period of early '47 there must have been three times that many in the early part of '48.

Q. I show you an exhibit here, which has been identified as exhibit 1, made by the Spectator Sportswear Inc., and known as Corsair, and I ask you if that is one of the competitive shirts which caused you to reduce your sales as you have described, or reduce the purchases? A. Yes sir.

Q. How did your experience with this shirt compare with your experience with other sports shirts? And sports jackets, did you, which you have merchandised and sold in your store? A. Well as the trade would term sports shirts we consider a shirt with the normal closure a conventional type shirt, this was styled in an unusual way, and that was the thing that had its initial appeal to us, from the standpoint of merchandising an item of new restyle and idea, and that's what we live on, our business is based upon fashion, and we considered this a unique work in designing and appeal and we presented it through the newspapers on that basis.

Q. My question was directed to what your experience was in selling the shirt to the public as compared with your experience in selling other types of sports shirts and jackets.

Judge Druffel: Well didn't we have that before, he said that there was a lull in this, and then this appealed to them and they started selling these and——

Judge Marx: He said there was a lull but I'm not sure that this particular point was covered. My colleagues think it was not is the reason I'm asking.

A. Well the sport shirt business at that particular time was tapering off and we bought the shirt thinking that it would be a stimulating factor in our sport shirt business at that time and it proved to be so.

Q. Well how did the public react. A. It was the biggest selling single item we've ever had in our store in the sports shirts.

Q. Well that's right. Well now I think your qualifications, I neglected to ask you about your being one of the group which selects men's wear items for the Hart Schaffner & Marx stores, do you have anything to do with that, or did you have anything to do with that? A. I have served on their merchandise committees for many years.

Q. How many men on that committee? A. Five.

Q. And you are one of the five? A. Yes sir.

Q. And how many stores do Hart Schaffner & Marx have, approximately in the country? A. I don't think I'd care to answer that, if you don't mind.

Q. Well it's a larger chain isn't it? A. Yes sir. That isn't publicly known that's the reason I don't want to answer. Because they are all subsidiaries.

Q. Without respect to ownership could you give us some idea throughout America, how many people handle the Hart Schaffner & Marx merchandise. A. It has nothing to do with the merchandising of each individual store. From time to time we have group publications such as Christmas books that we assemble at the various markets throughout

the country and select merchandise which is to be featured in these regular publications. That was done quite consistently prior to the war and only once since that time.

Judge Marx: You may cross examine.

CROSS EXAMINATION

By Mr. Horton:

Q. Is the Baskin store a Hart, Schaffner & Marx store? A. It's owned and controlled by Hart, Schaffner & Marx.

Q. And are you an officer of Hart, Schaffner & Marx? A. No, I am not of Hart Schaffner & Marx.

Q. I think that on this Cavu shirt that you said that you bought how much did you say that that retailed for? A. The lowest price was $12.95 if my memory serves me, do you want me to check that?

Q. No, just to your best recollection. A. And we retailed them up as high as $23.50.

Q. And the Mack shirt that you sold what was the retail price on that? A. $10 and $12.95. The $10.00 shirt was a rayon gabardine and the $12.95 was a corduroy shirt.

Q. Judge Marx: That might have been $11.95.

By Mr. Horton:

Q. Calling your attention to exhibit 1, that you have in your hand, what kind of fabric is in that shirt? A. This is rayon.

Q. Rayon gabardine? A. No—wait a minute. Yes sir.

Q. At the present time is, are sport shirts a substantial part of your business, and by that I mean of all styles? A. Yes sir.

Q. And isn't it true that that is something which has really grown up during the war and since the war, as compared with prewar days? A. I would say that in 1936 our sport shirt business was almost negligible, but in '37,

'38 and '39 and '40 on it started to pyramid, and by the time we got into the war it was substantial part of our all-over furnishing business.

Q. And since the close of the war it's even greater than it was before, is it not? A. Well all of our retail business has gone up, I know most of the retail businesses have almost doubled their volume, as in comparison with pre-war periods.

Q. Well let me put it this way then, your percentage of sport shirts of your total shirt sales is higher since the war than it was before the war isn't that true? A. Yes, slightly, that is, since, before the war, yes, because it came along pretty fast during the war.

Q. And during the war you weren't able to get your requirements of dress shirts were you? A. There was a definite scarcity in well, all of men's wear apparel, shirts and all.

Q. Did you ever spend as much as $11,000.00 advertising any other sport shirt? A. I don't think so. Of course, may I say this, I'd like to qualify that by making this statement, because that is about the only shirt that we have handled that is what we call a deviation from our conventional type. With one exception, we had a shoulder zip shirt, it had a shoulder fastener.

Q. When did you handle that? A. Last year.

Q. In buying these shirts from Cavu and Mack there were some differences in style of models, were there not? A. Not to my knowledge.

Q. There weren't? You didn't handle, for instance the Cavu shirt with the zipper that only went part way? A. No sir. Always one style, the full diagonal zipper.

Q. And was that also true of the Mack shirts? A. Yes sir.

Q. Did you handle any Marlboro shirts? A. No sir.

Mr. Horton: I think that's all.

Judge Druffel: Further questions?

REDIRECT EXAMINATION

By Judge Marx:

Q. There is this question, Mr. Ridenour, at the time you first purchased these shirts, I believe you gave us the date, sometime in 1947. A. 1946.

Q. Sometime in 1946, was there any scarcity of sport shirts at that time? A. Well they were beginning to be on the easy side, yes, there was more scarcity than there is now, but some fabrics were hard to get, particularly wool gabardines and things like that were not plentiful, but I think cottons and rayons were beginning to show themselves in substantial quantities.

Judge Marx: I think that's all.

Judge Druffel: Well you're excused.

(Witness excused.)

Judge Druffel: Next witness.

Judge Marx: We read yesterday a part of this stipulation but it was not marked in evidence and I think it ought to be filed now as offered in evidence. I don't know whether it's customary to file it or to mark it as an exhibit, for the records it's a stipulation.

Judge Druffel: Let them mark it.

Mr. Horton: Does that include those pages in the book?

(Plaintiff's Exhibit No. 11, was marked for identification and received in evidence.)

Judge Marx: We'll call Mr. Brohard and ask him to come back to the witness stand.

Whereupon,

Montie M. Brohard, Jr.,

resumed the stand, and having been previously duly sworn, was examined and testified further as follows:

FURTHER DIRECT EXAMINATION

By Judge Marx:

Q. Mr. Brohard, I think that you were asked yesterday about your sales and you were going to get your sales, have you got those now? A. Yes sir.

Q. Well if you've got a tabulated form I think we can file and you can just summarize.

Judge Druffel: Just the totals that's all.

Judge Marx: All right.

A. The total sales for 1946 was $572,170.93 of which approximately 95 per cent was our Tailspin style; 1947 sales were $754,295.02 and approximately 90 per cent of those sales were Tailspin; 1948 sales were $621,610.76 of which approximately only 50 to 55 per cent were Tailspin style.

Q. What is the situation at the present time? A. Sales for the first month of this year are only 25 per cent, roughly 25 per cent of what they were in January 1948.

Judge Marx: Now we'll file this detailed statement as an exhibit.

(Plaintiff's exhibit No. 12, witness Brohard, was marked for identification and received in evidence.)

Judge Druffel: Any further questions?

Judge Marx: Yes I do, if Your Honor please.

By Judge Marx:

Q. I want you to take the Corsair shirt, you now have the Corsair shirt, Exhibit 1, take that shirt and take the drawing attached to your Patent No. 2428198, and I will

ask you to examine that Exhibit 1, and state whether you find it has a front and back terminating in an upper neckline. A. I do.

Mr. Horton: I object to using the language of the claim on this, Your Honor.

Judge Druffel: Well of course that's exactly what he wants to do is, I think that that's all right, the question here on Exhibit 1 is within the limits of the claims of this patent.

Mr. Horton: Yes, I just question whether Mr. Brohard is a patent expert and versed in the interpretation of the claim.

Judge Druffel: Well that's for you to disprove by cross examination, that's——

Mr. Horton: No I don't think he's qualified.

Judge Druffel: Well he's a shirt manufacturer of how many years?

The Witness: Twenty-five.

Judge Druffel: Well he can tell what's in a shirt I think from that experience.

Mr. Horton: He can describe the shirt but——

Judge Druffel: Well if you want to you can test him at this point.

Mr. Horton: Well, Mr. Brohard, have you had any experience in the study and interpretation of patents?

The Witness: I have, I have three patents in my own name and I've acquired quite a bit of experience and I've learned a lot.

Mr. Horton: Did you work on them or prepare them?

The Witness: I did not prepare the English that goes into them, I had to furnish in these cases an original statement of the specific descriptions.

Mr. Horton: Did you have anything to do with the preparation of the claims in your patented suit?

The Witness: Only in counseling with my patent attorney, in the wording of various claims.

Judge Druffel: Well that's the usual—well, it's a very simple claim. All right, let's proceed.

By Judge Marx:

Q. I'll ask you whether or not you find in Exhibit 1, a fold-over collar, attached at said line and having flap portions overlying said front on opposite sides of the vertical center line of the front, and having the ends of the lines of fold thereof meeting at the vertical center line of the front? A. I do.

Q. Do you find said front comprising two portions? A. Yes.

Q. Does one of said portions extend at the neckline across the vertical centerline of the front, and terminate beneath the flap of said collar? A. It does.

Q. Do you find that the other portion terminates on said neckline beneath said flap at the point of termination of the first mentioned portion? A. Yes.

Q. Do you find that said two front portions, having meeting edges extending diagonally from said point of meeting of said portions at the neckline, aforesaid, toward the hip of the wearer located on the same side of the vertical centerline of the front as is said point? A. Yes.

Q. Do you find a slide fastener for securing said meeting edges along said diagonal line? A. Yes.

Q. Do you find that the upper terminus of said slide fastener, lying beneath said collar flap, so as to be concealed thereby, and the front of the garment between the flaps of the collar being unbroken by said diagonally extending meeting edges? A. Yes.

Judge Marx: You may cross examine.

CROSS EXAMINATION

By Mr. Horton:

Q. Mr. Brohard, these figures which you gave of sales, include all of the products of Cavu Clothes, Inc., is that true? A. I guess so.

Q. Now you do make a good many other products than simply the one Tailspin shirt, isn't that true? A. We're comparatively small, and in 1946 almost our complete production was on the Tailspin style of shirt, we had two other additional styles, which is not considered a large grade as a manufacturer, that's the Chandelle and the Lazy-Eight styles, but we weren't able to produce very many of those because of the demand for our Tailspin style.

Q. Now the Chandelle style and the Lazy-Eight, what are those, the conventional shirts? A. Yes.

Q. They don't—— A. The Lazy-Eight style is what, is a conventional sports shirt with collar as shown here except, with the exception of having conventional button front, and can be worn open or closed.

Q. And it differs from Exhibit 1 here for instance, in that it has a button front running down the center, instead of the zipper opening? A. That's right.

Q. Now that's, that's that blue shirt that you brought here isn't it? A. That's right. That's exactly right.

Q. Now you also made a shirt that had a zipper that ran only part way from the side to the front? A. That is right.

Q. What is the name of that shirt? A. We call that shirt the Starliner.

Q. And when did you start making that? A. We started making that I think about two years ago.

Q. These shirts that you made in 1946 that was before you had either of the patents in suit issued, isn't that true? A. I don't believe I understand the question.

Q. Well neither of the patents in suit were issued until 1947, isn't that true? A. I don't remember the date of issuance.

Q. Well it is, I think——

Judge Druffel: June 10, 1947, for the design and September for the mechanical.

Q. And how much were the sales of the Lazy-Eight shirt in 1946? A. I don't have that broken down sir in that report.

Q. Well have you looked at the books on that? A. Yes I have looked at the books, but we don't keep our sales broken down as to style.

Q. Then these sales figures that you gave us are not broken down in your books as between the different model products that you sold? A. No sir. That is the full total of my sales. And the only way I have of finding what the various items are is by conjecture at this point, unless I want to take those years' sales slips and actually total them all up.

Q. When you say then that your sale of Tailspin shirts was a certain percentage in a particular year that's simply a guess on your part. A. Yes sir.

Q. Now in 1948 you sold several models of shirts did you not? A. In 1948 we were merely forced to stock additional Chandelle and Lazy-Eights because we couldn't maintain our previous Tailspin volume.

Q. Well you also sold the short zipper shirt, did you not? A. No we didn't, that was brought out only to help us get some piece goods.

Q. When did you start selling these slanks? A. Slanks?

Q. Yes. A. Those were introduced about a year ago, a year and a half ago, but we weren't a big enough, our facilities weren't large enough to produce the shirt that

we were selling at that time to enable us to go out and promote the sale of this new Slank item. This year, inasmuch as our Tailspin sales began to fall off, we were able to reintroduce it and we sold this new Slank item, and we sold a few in '48.

Q. Have you discontinued entirely making that shirt with the only partial zipper? A. Yes sir.

Q. That was advertised by you was it not? A. Not in consumer magazines, but I frankly don't remember whether we advertised it in trade magazines or not.

Q. It was advertised by your customers was it not? A. It may have been advertised by a few of them.

Q. Well you know that it's in that book of advertising, don't you? A. Yes that's right, there are a couple of ads in there. We had to stop making that at that time as a matter of expediency because of our small production facilities.

Q. I think you said that it was early in 1944 that your ideas became crystallized on this Tailspin shirt, is that correct? A. To the best of my recollection that's correct.

Q. The reason I question that is because in answer to interrogatories you had a different date. You said that, in answer to interrogatories that the plaintiffs collaborated in first making a shirt of the kind patented late in the year of 1943. Does that refresh your recollection as to when it was or is the '44 date correct? A. Well the original question was when did my mind become crystallized on the shirt now known as my Tailspin, is that right?

Q. Yes. A. Well your statement in that interrogatory there says will you read that again please?

Q. The plaintiffs collaborated in first making the shirt of the kind patented was in the year 1943.

Judge Marx: Well he asked him to read the question.

Mr. Horton: He asked me to read what I just read to him, I think.

Judge Marx: No, the question, that was in answer to what kind of question?

Mr. Horton: All right. "When did his mind first crystallize on this——"

Judge Marx: No that's isn't the question. The interrogatory.

Judge Druffel: I know that the question now is to what date the '44 or '43, and you asked him to read back the answer you gave to the interrogatory. Is that what you did?

The Witness: Yes sir, because.

Judge Druffel: He wants the answer in the interrogatory.

Mr. Horton: In answer to Interrogatory Number 1: "The plaintiffs collaborated in first making a shirt of the kind patented late in the year 1943." A. I would say that the matter of recollection that my date of the crystallization in my mind on the Tailspin style is still correct, it's early in '44, and that the answer to that particular, the explanation as to that answer is that that was one of the garments that was made before the final shirt was crystalized.

Judge Druffel: We've reached the point for afternoon recess. We'll recess at this point until two o'clock.

(Whereupon, at 12:30 p.m. a recess was taken until 2:00 o'clock p.m. of this same day.)

AFTERNOON SESSION

2:00 p.m.

Montie M. Brohard, Jr.,

resumed the stand and was examined and testified further as follows:

CROSS EXAMINATION (Continued)

By Mr. Horton:

Q. Now Mr. Brohard, you say that your ideas became crystallized on this Tailspin shirt in 1944, but in answer to interrogatories you said that you had first made a shirt of the kind patented late in the year 1943. Now in what way did the shirt made in 1943 differ from this Tailspin shirt from which you say your ideas crystallized in 1944? A. I don't know whether you have ever developed a garment or an idea before yourself, but as you know you put together a lot of experimental ideas, before you arrive at the final idea that you think is the one that you want to use. Now then the language that's used in the interrogatory thing there is rather awkward language to me as a layman and all that I meant in there was that I instructed our cutters and our sewers to assemble, ah, different types of garments leading up to the one that I actually decided upon in early 1944.

Q. I see. Well then the one that you decided upon in 1944 is the shirt illustrated in your patent is it not? A. I would say so, yes.

Q. And these that may have been made up in 1943 were something leading up to that final form? A. Right.

Q. What did you do about making up those preliminary forms? A. Well in the garment business, that is in a small business like ours, we didn't make up the entire shirt, we were making, if we were making a new collar we'd only make collars, if we were making a new front on a shirt, we just made up fronts and put them on skeleton garments, not worrying to make new sleeves and new collars and new cuffs, and so forth.

Q. Well when you first got the idea about this shirt, that was sometime in 1943? A. No I wouldn't say that.

Q. When was it? A. Well after I began to fly I began to realize the need for a peculiar type of garment to my sport and then my thinking began to roll, but I didn't crystallize upon the idea that came out in this shirt until early in the '44's.

Q. Well did you do anything about making drawings, or making up models of your shirt in 1943? A. Part of the evolution of the thing undoubtedly consisted of making sketches for my foremen to cut pieces of fabrics so that the girls could sew it together to see how the Tailspin would look.

Q. Did you make such drawings? A. I undoubtedly did.

Q. Do you have any of them? A. No I don't.

Q. Are you familiar with an Empire shirt which had a zipper on it? A. It doesn't strike any familiar note with me at this point.

Q. Is it, or is it not a fact that you took an army shirt with a zipper on it and gave it to one of your cutters as a model in connection with the making of a preliminary form of this shirt? A. No, I don't recall having done it that way at all.

Q. Have you ever actually worked in the shirt cutting department? A. Yes sir.

Q. And had you made shirt designs before? A. Yes sir.

Q. You did have shirts made with zippers on them before the Spitfire did you not? A. Not to my recollection.

Q. Did the Brohard Rainer Company? A. No, that's what I am referring to.

Q. Did that company make the Bib and Tucker shirt? A. That was one of the evolutionary developments leading up to the eventual development of the Tailspin.

Q. And when was that Bib and Tucker shirt made? A. I presume that that could have been made in late '43 or early '44, I am not sure.

Q. Was that ever the commercial model? A. Not to my knowledge.

Q. Now that had a biased zipper on it, did it not? A. No, I don't think so.

Q. Did you make the design of the Bib and Tucker shirt? A. I sketched it. Let me clarify your thinking in this respect, I am a shirt stylist and I design the shirts, that is I sketch, by sketches, and an ordinary cutter or pattern-maker develops patterns from my designs and sketches, so that we are both talking about the same terminology, the designer is not necessarily the one who cuts the pattern; similarly the pattern cutter is not necessarily the designer.

Q. All right. I think I understand you. Now, speaking about this bib and tucker shirt, was that ever actually made up into a model of which patterns were made? A. Your question is rather ambiguous because you have to first have your pattern before you can make a model.

Q. Well were patterns made for the bib and tucker shirt? A. It's conceivable that a sketch was made and that a temporary paper pattern was made in order to attempt that type of front.

Q. Now that did have the bib front, did it not? A. As I recall the Bib and Tucker had the bib front, yes.

Q. And it has a bias zipper on one side of that bib did it not? A. No.

Q. What was the manner of fastening that garment? A. The manner of fastening that garment to my recollection was only a button at one hip and a button at the other hip.

Q. And did it pull over your head? A. No, it was a sort of wrap-around type of garment.

Q. Was the opening in the back? A. No the opening was in the front.

Q. Was it a diagonal opening? That ran off to the hip at the right side, was it not? A. Yes sir, it could have run either way.

Q. Now, working from the Bib and Tucker shirt,——

Judge Marx: Is there any reference to that in the citations in the answer——

Mr. Horton: No.

Judge Marx: Well I object to it.

Mr. Horton: Well it's preliminary, leads up to how he made the design of the shirt, certainly pertinent to——

Judge Druffel: Well of course the question may go to the credibility of the witness.

Mr. Horton: It goes also to this question of whether or not there was any invention in doing what he did.

Judge Marx: Well it's not—they've given references to a very large number of alleged pre-existing art, and not one of those references have anything to do with this. Not anything in the defense, and therefore not relevant. I object to it.

Mr. Horton: Well, it's certainly relevant to the question of invention.

Judge Druffel: All right, objection will be overruled, you may proceed.

By Mr. Horton:

Q. Leading from the Bib and Tucker shirt to the zipper shirt, didn't you take a Bib and Tucker shirt and lay a zipper along that diagonal opening of the shirt, as the basis for your model of the Tailspin shirt? A. No.

Q. What was the step from the Bib and Tucker shirt to the Tailspin shirt? A. Well, as your question is stated you are inferring that there was only one step, whereas there were probably many steps.

Q. Well what did you do, you said that it was one of the preliminary forms, now what did you do with the Bib and Tucker shirt to change, produce the design of the Tailspin shirt? A. I can't honestly testify that the Bib and Tucker shirt had any relationship to it, if that's what you want me to say.

Q. I thought that you had already said that, maybe I am mistaken. A. It was one of the evolutionary steps, frequently in the evolution of a garment sometimes tangents come into your mind that are wholly unrelated to the conventional garment, do you follow me?

Q. Yes. You did not take a Bib and Tucker Shirt then and remodel it? A. No sir.

Q. Now when the zipper shirt was first made by you that had a zipper running all the way down to the lower edge of the garment did it not? A. No I don't think so.

Q. From the start you had it running to an opening at the hip? A. I don't recall that. As I recall it we did.

Q. Did anyone work with you in designing that garment? A. If you are using that word designing the way I use the word designing, no one worked with me.

Q. And did anyone work with you in the preparation of the original model? A. I made sketches of my ideas and every sketch was probably a little bit different from the preceding one, and each of those sketches required that a new soft paper pattern be cut; those I instructed our cutter, any one of our cutters to cut a different piece of paper in the progression of the developing of this shirt.

Q. Now the first shirts which you made of this Tailspin model were made by the Brohard-Rainer Company, were they not? A. Right.

Q. And when were they made? A. You mean the first model?

Q. Yes. A. To the best of my recollection is early in '44.

Q. When did you first sell one of the Tailspin shirts? A. Sometime in the Spring of '44.

Q. And where was the first one sold? A. I don't recall. I'd have to verify my sales.

Q. Now at the time the Tailspin shirt was brought upon the market, it was brought on the market by the Brohard-Rainer Company, wasn't it? A. That is right.

Q. And you were an employee of that company? A. Yes sir.

Q. And when was it that you formed a separate company to manufacture the Spitfire shirt?

Judge Druffel: Not the Spitfire, you don't mean the Spitfire.

Q. I mean Tailspin. A. Yes. The first company that I formed was not to make the shirt but was to sell the shirt. I formed a partnership in the beginning, more or less as a selling organization.

Q. And was the Brohard-Rainer Company making the shirts for you at that time? A. That is right.

Q. How long did that company continue making shirts for you? A. Until my new business was big enough to buy out a factory to start making them ourselves.

Q. Well when was that? A. I think we started making our own shirts in the middle of '47.

Q. Well when you testified that, at first your orders were such that you received more orders than your small equipment would produce, you were referring to the equipment as Brohard-Rainer Company? A. Yes sir.

Q. How large a manufacturing plant did that company have? A. They had about fifty sewing machines of all types in Cincinnati because they were basically a custom-

shirt manufacturer, and at that point I think they had about twenty-five or thirty machines in Cynthiana, Kentucky.

Q. And during that time did the Brohard-Rainer Company continue its business of making custom shirts? A. Yes sir.

Q. And it was only a portion of their facilities then which were used for making the shirts for the Cavu partnership? A. That's right.

Q. Well now what proportion of that—— A. I don't know what proportion that would be at this point, it would merely be a guess.

Q. Are you, now you called this partnership Cavu to start with, did you not? A. I think the name we began with was Cavu Clothes.

Q. And Cavu you said I think you said meant Ceiling and Visibility Unlimited? A. That's true.

Q. Now that was not a word coined by you, was it? A. We had to register it for use in the textile industry, before that time no one else to my knowledge had ever heard of it being used as a word.

Q. Well wasn't it a common word in the Army Air Force? A. Half the towers would tell you that the weather was C.A.V.U. and half of the towers would say that the weather was CAVU.

Q. And a good many of the army soldiers during the war would say CAVU instead of saying those letters C.A.V.U., isn't that true? A. I think that would be correct.

Q. Now after you applied for and obtained the first design patent in suit, did you grant a license to Cavu? A. Will you please state that question again I'm not sure what you mean?

Q. I say after the design patent in the suit issued, did you grant a license to Cavu Clothes? A. I don't remember.

Q. Well has there ever been any kind of a written license between you and the other plaintiff in this suit, Cavu Clothes, Inc.? A. Yes.

Q. A written license? A.Yes.

Q. Does that written license exist at the present time? A. Yes sir.

Q. On interrogatories I asked you: "What is the nature of the interest of plaintiff, Cavu Clothes, Inc., into and under the patents in suit?" And you answered that in answering interrogatory number 6, "Cavu Clothes, Inc., is an exclusive licensee with power to grant sub-licenses under the patents in suit."

In interrogatory 7, I asked you "If plaintiff, Cavu Clothes, Inc., claims an interest, either as an owner or a licensee under the patents in suit or either of them, produce and supply to defendant a true copy of any written assignment or license under which said plaintiff asserts such interest." In answer to that you stated, Answering Interrogatory Number 7, Plaintiff, Cavu Clothes, Inc., is licensed orally by the patentee Brohard, Jr., to make use and sell garments under the patents in suit, and to sub-license others to do the same."

Now at the time you made that answer was there in existence a written license? A. I don't think so or I wouldn't have given that answer.

Q. Will you produce the written license to which you now refer? A. I can't, it's not here, unless my attorneys have a copy of it.

Judge Druffel: Have you got another copy for counsel?

Q. Well this license was entered into sometime in May 1948? A. I frankly don't remember.

Q. Well It says at the bottom "Signed in Cincinnati this blank day of May, 1948," is that correct? A. I don't

remember the date that I signed this, we might have inked out and added '48 when it was signed and put in the proper date, I wouldn't testify to the exact date I signed that without referring to my copy.

Judge Marx: Well if the exact date is material we can get the original and supply it. There's no hesitancy in giving it to you.

Mr. Horton: It's strange how many things differ from the answers to the interrogatories, though.

Judge Marx: I object to that, if Your Honor please. It is argumentative and not a statement of fact or of the question.

Judge Druffel: Well we will accept it as a comment then.

Mr. Horton: That's all it was.

Judge Marx: It's a practice of our public officials to say no comment is better. General Eisenhower recently said "No comment on no comment."

By Mr. Horton:

Q. In also asked you in interrogatory: "Name each of the licensees of the plaintiffs, or either of them, to whom reference is made in paragraphs 7, 8 and 9 of the complaint, and produce copies of each of the licenses, which plaintiffs, or either of them, have granted under one or both the patents in suit." You answered that, answering interrogatory number 8, "The licensees are (1) The Mack Shirt Corporation, Cincinnati, Ohio; (2) The United States Government Navy Department, (3) Marlboro Shirt Company of Baltimore, Maryland, (4) Winston Sportswear Company of New York, New York." You did so answer that way, did you not? A. I presume so.

Q. And then, you filed an affidavit some month or so later in which you said Montie M. Brohard, Jr., upon being duly sworn deposes and says that he is one of the plaintiffs

named in the above captioned clause, that he furnished the information necessary to the preparation of the pleading therein, entitled "Plaintiff's answer to Interrogatories" which was filed with the Clerk of the U. S. District Court at Cincinnati, Ohio on or about May 14, 1948, and that he signed said pleading, that by mistake the name of Marlboro Shirt Company at Baltimore, Maryland, was included in the list of plaintiff's licensees, whereas in fact neither he nor Cavu Clothes, Inc., co-plaintiffs in the indicated cause has any form of patent license arrangement with said Marlboro Shirt Corporation. That he as president of said Cavu Clothes, Inc., of his own knowledge definitely knows that no patent license is between said Cavu Clothes, Inc., and said Marlboro Shirt Company, and that said interrogatory number 8 is in error to the extent that it names Marlboro Shirt Company, as a licensee of the plaintiffs. You did so answer did you not? A. Yes sir.

Q. Now at that time was the license agreement in effect which was identified this morning as Defendant's Exhibit A, wherein Marlboro Shirt Company was paying royalties to Cavu Clothes, Inc? A. What do you want me to say on that, do you want me to admit that such a license existed between the Mack Shirt Corporation and Marlboro?

Q. Yes, at that time. A. Well all I can do is presume because I am not in on their negotiations with Marlboro.

Q. Well Marlboro Shirt Company under that license was paying royalty to Cavu Clothes, Inc., was it not? A. That's true.

Q. Directly. A. Directly.

Q. Was there some reason for you to conceal the existence of that Marlboro license.

Judge Marx: Well I object to that, on the contrary we revealed it, the error was in saying it was a license between

Cavu Clothes and Marlboro, whereas the sub-license was granted by the Mack Shirt Company, which had an exclusive license within a limited field.

Judge Druffel: You may answer yes or no to the question.

The Witness: I don't remember the question.

Q. Did you have any reason for concealing the existence of that Marlboro license? A. I made no conscious attempt to conceal anything.

Q. Now in response to interrogatories you produced copy of a Mack Shirt Corporation license in which certain portions were blocked out, and one of those was—well I'll show you the photostatic copies which you produced, one was the letter of June 12th, was it not? June 12, 1947? A. My attorneys got this for you, I presume this——

Judge Marx: Talk a little louder.

A. I say I don't know who he got them from, my attorneys fixed them for you.

Q. Well that is your signature appearing on page 3, is it not? A. That is mine.

Q. And is that a photostatic copy of the first Mack Shirt written license? A. I couldn't say that that was the first. I am not familiar with the chronology of the dates.

Mr. Horton: I'd like to have that marked for identification as Defendant's Exhibit "B."

(Defendant's Exhibit B, was marked for identification.)

By Mr. Horton:

Q. Now did you read Exhibit B. That provides——

Judge Marx: Just one minute here, we'll give you the original with nothing blocked out.

Mr. Horton: Well that's very gracious of you. We've been waiting for that for two years.

Judge Marx: Well you've had everything except the royalty.

By Mr. Horton:

Q. Now that license in paragraph number 2, thereof, provides that subject to termination as hereinafter provided we will be granted a five-year license to be the sole manufacturers and distributors in the United States and foreign countries of your Tailspin model shirt in washable fabrics for men and boys. Isn't that true? A. Right.

Q. And the part that was blocked out on Defendant's Exhibit B for identification in paragraph 2, is the word "washable" is that true? A. In this paragraph here?

A. In this paragraph here?

Q. Yes. A. Right.

Judge Marx: Would you mind putting the executed copy in evidence in case we refer to that?

Mr. Horton: I'd rather put in the one that you gave me first.

Judge Marx: Put them both in.

Mr. Horton: No, you put it in if you want.

Judge Marx: Will you mark it for identification as an exhibit?

"Plaintiff's Exhibit No. 13 was marked for identification.)

Judge Marx: It's in, I offer it as an exhibit.

(Plaintiff's Exhibit No. 13, was received in evidence.)

(Defendant's Exhibit B, was received in evidence.)

By Mr. Horton:

Q. Then there was produced and handed to me in response to interrogatories, a photostat of a two page document headed: "Supplementary agreement modifying license contract" of June 12, 1947. I'll show you that photo-

stat and ask you if that is a photostat of such a document which you signed.

Judge Marx: Now just a minute, I don't understand the relevancy and I object to it unless the relevancy is made clear what is the purpose?

Mr. Horton: The relevancy of the Mack Shirt licenses go directly to the absence of a necessary party plaintiff in this case. Exclusive license as shown by the original license was granted to the Mack Shirt Company to make mens' and boys' shirts in washable fabrics; the structure that's charged to be infringed in this case is of that type and in that field, and Mack Shirt is the one that has the exclusive right in that field and under the law is a necessary party plaintiff in this case. Well the pertinency of any modification of the license is of course to show if there has been any change in it.

Judge Marx: The Mack Shirt Company has no license at all with respect to women's or girls' wear.

Mr. Horton: And the defendant in this case, Squires, Inc., sells only men's shirts.

Judge Druffel: Well all right, where do we go from here? That's the relevancy?

Mr. Horton: Yes sir.

Judge Druffel: All right, let's have it, your answer.

The Witness: What did you want to know?

By Mr. Horton:

Q. Is that photostat a true copy of the modification which was entered into on that date? A. I'm not familiar enough with the modification to verify the fact that this is the modification, but I can verify the fact that I signed this, this is my signature.

Judge Marx: I might say, if Your Honor please, that we have no objection at all to Mack Shirt Company being

made a party plaintiff, unless counsel thinks it necessary for their protection to make them a party defendant, and they'll waive service of summons and everything else and come right in. I don't think it is necessary but if counsel for the other side regards it, or Your Honor thinks it advisable why that can be done immediately.

Mr. Horton: Well I think that it is necessary for the protection of the defendant in this case that they be a party; and this point has been raised a good many times before and I think that it places me in a rather unfair position to make this move at this time.

Judge Marx: Mr. Mack is here in the court room and if there's no objection, there's none on our part, why Mack Shirt Company will be made a party in this case, and I'm authorized by Mr. Mack to waive the matter of his appearance and consent to proceed without further ado. We'll have to draw up papers, I suppose, but I mean we have the consent in open court that the President of the Company is willing.

Judge Druffel: Let's have the counsel for defendant at this point.

Mr. Horton: I think that may be acceptable but I would like to think about it for about five minutes.

Judge Druffel: Well for practical purposes I don't see that it makes any difference at all, we are just entering their appearance and they are bound by the action here, but if you think it's necessary for your protection it's up to you to make the motion.

Mr. Horton: Well I have made the motion of course before and the objection was made in the answer. I'd like to think about that for a few minutes before I, I think now that will be sufficient.

By Mr. Horton:

Q. Actually at the time this suit was filed in January, 1948, there was this license to Mack Shirt Corporation in existence was there not? A. Yes sir.

Q. And there was the license between Mack Shirt Corporation and Marlboro Shirt Company in existence, was there not? A. I don't believe I can answer that.

Q. It bears data of July 1, 1947. A. What was the date of the Mack license?

Q. June 12, 1947. A. Well then that must have been in effect.

Q. Was there at that time any other license in existence under these patents in suit? A. You mean on June 12, '48?

Q. At the time this suit was filed in January 27, 1948? A. I don't recall what time the Winston Sportswear Co., in New York, when their license was granted.

Judge Marx: I think you've got a copy, haven't you Mr. Horton of the Winstead license?

Mr. Horton: Winston, yes.

The Witness: Winston Sportswear.

Judge Marx: I thought you said you didn't have a copy of it and couldn't give him the date, but you have a copy there.

Q. Yes, that bears date December 19, 1947, so that was in existence at that time? A. That sounds about right.

Q. And Mr. Winston is of the Winston Sportswear Company? A. Yes sir.

Q. Now that license was specific to ladies' garments, was it not? A. That's right.

Q. And it was subsequently on February 5, 1948 that the royalty free license was granted to the Navy, isn't that true? A. That sounds to be about right, I can't remember all those dates in my mind. I signed the license for the

Navy and that's my signature, that's about all I can attest to.

Q. I believe you testified that the Lazy-Eight shirt was a conventional sport shirt made by your company? A. Right.

Q. Is that true? A. True.

Q. And that is the blue shirt that we have before us? A. Yes sir.

Mr. Horton: I'd like to have that marked for identification as Defendant's Exhibit C.

(Defendant's Exhibit C, was marked for identification.)

By Mr. Horton:

Q. Now you were telling of some of the advantages of the Cavu shirt, and you pointed to the fact that it had a plain bib front, did you not? A. That is true.

Judge Marx: Referring now to the patented shirt?

Mr. Horton: Yes. Was there one marked for identification or in evidence?

Judge Marx: We have a woman's style, if Your Honor please that was attached to one of the depositions, it's a, Plaintiff's San Diego exhibit number 1, and that's the one that the Navy Flight Nurse testified about and that can be used if counsel wants to use it.

Mr. Horton: Thank you.

Q. One of the advantages as you said of your shirt was this plain bib front, now by that you meant the plain unbroken expanse below the collar when wearing a jacket? Isn't that true? A. That's true.

Q. And when wearing a jacket or coat you cover up both the zipper and the pocket, isn't that true? So that there is no break between the point of the collar and the exposed part where the coat is open. A. Unless you are sitting in a sloppy position like I am now anything can wrinkle.

Q. I'm not—— A. When you're standing or sitting normally nothing but a plain bib front, no seams nor stitching or pleats are shown.

Q. Now another advantage which you claim for that is that it can be worn with or without a tie, isn't that true? A. That's true.

Q. Now isn't it true that sports shirts generally are worn without a tie? A. It all depends upon the class of men that are wearing them.

Q. Well the class of men that wear sports shirts generally wear them without a tie don't they? A. I wouldn't agree. Secondly I think there are two classifications of sports shirts. There is the spectator sport shirts, and that's not referring to your company, and there are the sport shirts that you play golf in when you participate in sports shirts; the type of sports shirts that I make and the Mack Shirt Corporation makes I would say you could have almost as many wearing ties as who do not wear ties.

Q. And of the other type of sports shirts the ones that you and Mack do not make, is it that more people wear it without a tie or with a tie? A. I can't say how many Mack makes. I would say that those shirts that are worn for participation in sports, ties are not very frequently worn.

Q. The type of shirt such as your Lazy-Eight shirt is worn by spectators at sports events is it not? A. That is true.

Q. Is that type shirt worn without a tie? A. Sometimes. Frequently is not.

Q. Now, when you have the shirt open I think you claimed that the propeller wash would close the shirt, is that true? A. That is right.

Q. And if the draft were blown from the other side of that shirt, would it close the shirt? A. Depending upon

how far down you have your zipper zipped, it just doesn't even come open.

Q. It wouldn't, it certainly wouldn't close the shirt if the draft was from the other side, would it? A. If you haven't already opened the shirt manually the wind would not blow it open.

Q. If it is opened, and opened as you have indicated here, would the propeller blast close it, if it were from that side?

Judge Marx: You mean if you took an end and pulled it open, is that what you mean?

Mr. Horton: He illustrated it here with the zipper open and told us how the propeller would close it.

Q. Now I say that when you have the zipper open on the thing, part way, and that if you have a propeller blast of air will that blow that closed? A. It's not open.

Judge Druffel: Well assuming that it is open, he's assuming that it is open.

Judge Marx: Well that's the reason I asked him what he meant, the question is ambiguous, you can open the zipper and then the question is will the wind cause the shirt to blow open, or you can pull the shirt with your hand, open the zipper and pull it across with your hand, that's a different question.

Judge Druffel: Well will you repeat the question then?

Mr. Horton: Maybe I'd better start over again on it.

Q. If you have the shirt open like that and the blast of air is from this side it won't close the opening of the shirt will it? A. If you have opened the shirt and pulled the shirt apart in the manner which you just did, the blast, propwash will not close that shirt.

Judge Marx: Go ahead finish your answer, but——

Mr. Horton: He had finished his answer.

Judge Marx: No he did not.

Mr. Horton: Well I object to you asking him to add something to his answer.

Judge Marx: Well he says but—what does the but mean.

A. Well I, I——

Mr. Horton: He didn't say but.

A. Well I presupposed my answer just a minute before by telling him that if he opened the shirt manually that the propwash would not close it but his original question was if the zipper were zipped down, and if only the zipper is zipped down the shirt is not open, as you opened it there, because the shirt acts differently upon a person than it does taking it out of a box.

Judge Druffel: Well do you want to use the witness as an illustration so we'll know.

Mr. Horton: Well will you take off your knit tie and open, pull down the zipper, take off your coat, I'm sorry for the inconvenience.

The Witness: Well certainly I'm accustomed to it.

Judge Marx: I think you've done that a good many times.

By Mr. Horton:

Q. Now will you open the zipper? A. Now you can see that the shirt is not open.

Q. Will you see that the, will you pull the zipper further down——

Judge Marx: Turn around so that the Judge can see it.

Judge Druffel: I can see it. All right go ahead with your question.

Q. Will you pull the zipper farther down? Now the shirt is unzipped but it hasn't fallen down to expose your throat? A. That's right, its loosened.

Q. All right, now under that circumstance it doesn't make any difference where the propeller blast comes from

it won't close the shirt in any way will it? A. I can't tell you at which point this zipper has to be before the propwash will open it, but I know that at varying points along here, there is one point at which I can pull this to at which the wind coming from this side will not open the shirt.

Q. And it won't close it will it? Coming from that side? A. Well if its not open it can't be closed.

Q. And the same is true now of the propwash coming from the other side, it won't close it or open it? Will it? A. That's ambiguous.

Mr. Horton: The answer is obvious, I don't believe there is any more.

By Mr. Horton:

Q. Now you talked about making some tests and temperature tests between this shirt, the blue gabardine shirt and leather jacket, is that right? A. Right.

Q. Did you use a wet bulb therometer on that? A. Homemade wet bulb therometer.

Q. And the idea of touching it to your body was to show that the more air that went through the fabric the cooler it was? A. No, not the more air that went through the fabric, the more—my tests were intended to show that the Tailspin shirt prevented less air from reaching the bulb of that thermometer than any other construction of shirt.

Q. Where did you have the bulb located? Wasn't it on the outside of the shirt? A. Oh no, it was under the shirt.

Q. And what was the purpose of the test to show, did you have it at body temperature? A. You mean the thermometer?

Q. Yes. A. No the thermometer was run down to 40 or 50 degrees before each test and then by leaving it under-

neath the shirt for 30 seconds under normal conditions the thermometer would go up pretty close to normal body temperature.

Q. And when you blew this draft of air on the shirt, having the thermometer inside you got varying degrees of temperature, depending upon which shirt you had it in, is that right? A. Yes sir.

Q. And what were those differences in temperature? A. Well I had a string of figures on paper at various degrees of direction of the wind and also various degrees of opening of the shirt and it would be very difficult to remember all those calibrations.

Q. I see, and you don't remember them? A. No sir.

Q. And you don't remember them? A. No sir, there was a difference, that's all I can remember.

Q. A difference would depend to some extent at least upon the kind of fabric used in the shirt would it not? A. I anticipated that that question might be raised, that's why I used two shirts of identical fabric.

Q. I say that that difference would depend upon the kind of fabric would it not? A. I didn't make that test so I don't know whether that will affect it or not.

Q. Oh I thought that you just said that you anticipated it and therefore used two shirts of the same fabric. A. That's true but I did not test shirts of other fabrics to see what that difference might be.

Q. Well would it be true, in your opinion, that a shirt made of a thinner fabric would admit more air than a shirt made of thicker and more closely woven fabric? A. I didn't make the test but I would imagine that mosquito netting would be quite cooler than wool gabardine.

Q. And in between mosquito netting and wool gabardine there are thinner fabrics than wool gabardine which would

admit more air than the wool gabardine, isn't that true? A. I can see that we can get into a technical discussion of the perosity of fabrics and I'm not qualified to answer.

Q. Well there's nothing in your patent in suit about the fabric, kind of fabric out of which the shirt is to be made, is there? A. No. No.

Q. Now these shirts made by Cavu are made both for women and men and I suppose in similar sizes for boys? A. No. Just for men and women.

Q. Just for men and women? A. Oh we made an occassional boy's shirt just as a gratuity but——

Judge Marx: Well by these shirts you mean the patented. Just to identify what you mean by these, as we've got some other shirts there.

By Mr. Horton:

Q. I mean these shirts made by Cavu that have the diagonal zipper and are like those shown in the patents in suit. A. That's right. Mostly men and a few women's.

Q. And your, did your licensees make any for boys? A. They are licensed to do so.

Q. Do you know whether they make any? A. To my knowledge they haven't made any boys shirts yet.

Q. I think you said that this shirt—the Flightmaster—has been used for ski wear is that true? A. I am told it is, I haven't actually seen it used in ski wear.

Q. I thought you testified that it was used for ski wear? A. I testified that I had a clipping that states that it was used in ski wear.

Q. Is the zippered shirt manufactured by your company used as an outer garment in sports? A. I don't see that I can prevent people from wearing it as an outer garment if it is their desire, it was originally intended as a shirt, I mean just a shirt to put on underneath the coat,